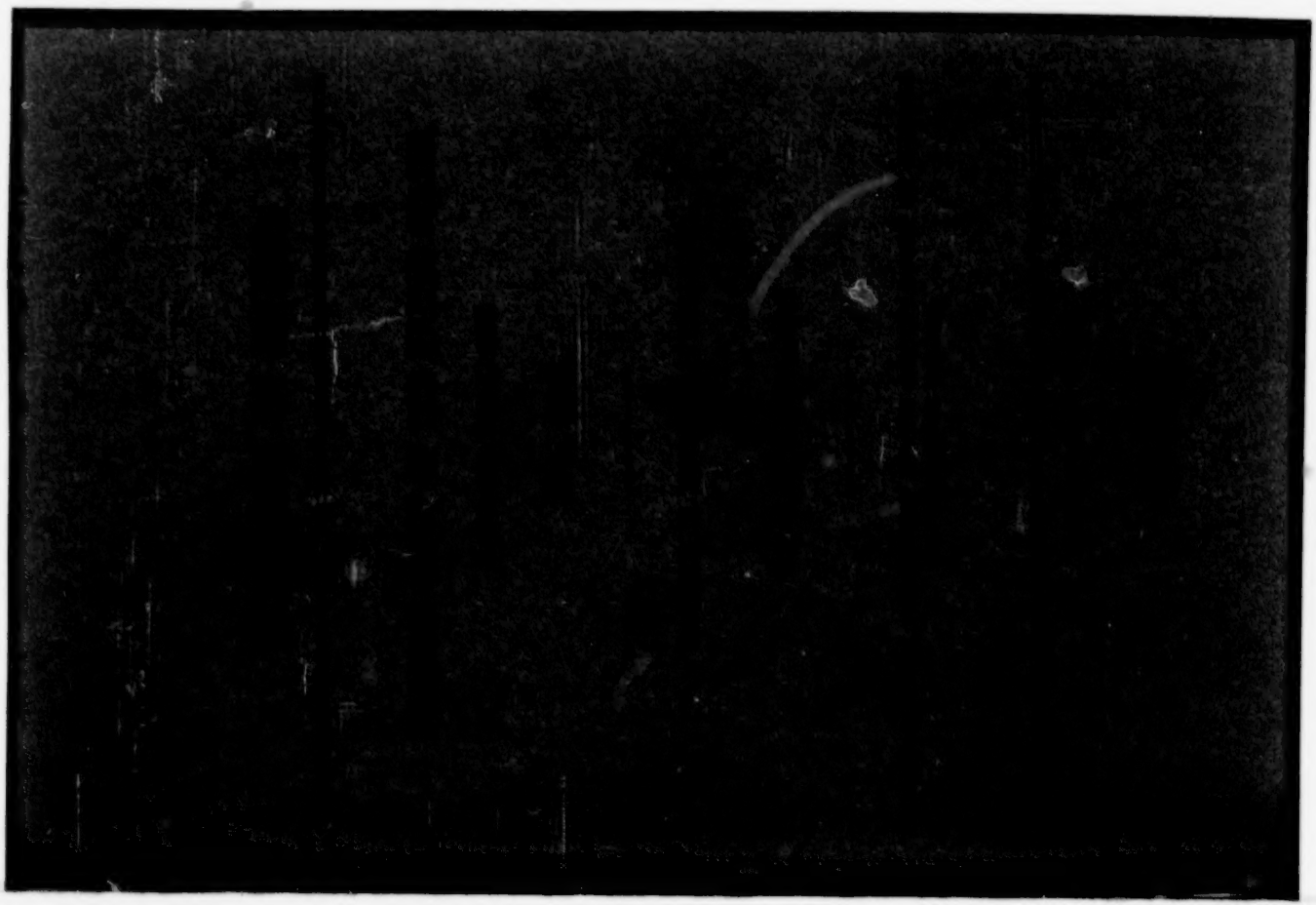

(27,852)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN, APPELLANT,

vs.

WILLIAM B. EDWARDS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

WASHINGTON, D. C., DECEMBER 6, 1920.

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

On Appeal from the United States District Court for the Southern District of California, Southern Division.

Names and Addresses of Attorneys.

For appellant:

Duke Stone, Esq., 436 Merchants National Bank Building, Los Angeles, California.
Dan V. Noland, Esq., 434 Merchants National Bank Building, Los Angeles, California.
Patrick H. Loughran, Mills Building, Washington, D. C.

For appellee:

Henry M. Willis, Esq., 511 Citizens National Bank Building, Los Angeles, California.
William B. Edwards, (In pro. per.) 519 E. State Street, Redland, California.

1 *"Amended Bill of Complaint.*

To the Honorable the Judges of the United States District Court:

And now, June 24th, 1918, complainant above named, by leave of the Court first had, files this as his amended complaint and says:

That he is a citizen of the State of California, residing at Redlands, within the Southern Judicial District and Division of California, and brings this complaint against Patrick H. Bodkin, a citizen of the State of California, residing at Neighbors, within the Southern Judicial District and Division of California.

Jurisdiction of this Court exists by reason that this is a suit in equity arising under the Constitution and the laws of the United States, and the matter in controversy herein exceeds in value the sum of $3,000 exclusive of interest and cost.

For cause of suit complainant alleges:

I. On December 1st, 1902 he made entry under the homestead and Reclamation laws of the United States of the North East Qr. of Section 11, Township 7 South, Range 22 East, S. B. M., he being at the time qualified in every way to make and perfect such entry, and the

land entered being then unappropriated public land of the United States and subject to such entry.

Thereafter plaintiff made substantial and good faith compliance with all the requirements of the homestead and reclamation laws, made final proof of such compliance before the United States
2 Land Office for that land district, April 23, 1909, proved such compliance by two credible witnesses, made oath to all the items required by law to make oath, and paid all the fees required by law to be paid precedent to receiving patent after publishing in due forom notice to all persons having or claiming a better right to such land to there and then appear and exhibit such claim of right.

II. No person appeared at that time and place and offered evidence of a better, or of any right adverse to plaintiff, nor was notice ever given plaintiff by the land office that the proof submitted was defective in any way as the special conditions under which entry was made required, if proof was defective, but the land department—ignoring and mistaking the law (and proceeding through a partisan bias and prejudice) refused at all times to consider such proof, or to issue patent to plaintiff consequent thereto, the excuse for such refusal being that this defendant—then admittedly without right—might, under certain conditions, become possessed with a right to appropriate the same land at some unknown future time.

III. At all times after making proof as aforesaid, plaintiff was and is now possessed with the equitable title to the land described, entitled to the issue of patent by the land department of the government as evidence of such title, and to bring suit in a court of equity to maintain his right of title and right of possession to such land.

3 IV. After making proof as aforesaid, plaintiff continued to reside upon the land as theretofore, to cultivate and improve it according to his intention when making entry thereof, and kept his claim of patent continually before the land department, but continuing the assumption of defendant's possession of a futurely accruing right as a perpetual franchise, and regardless of the appeals, petitions and protests of plaintiff at all times, before it, the land department, in recognition of the presumed future right of defendant, and in acceptance of a series of scrip applications made by him March 6, 1914, issued at him a series of patents to the land described, as follows: July 28, 1915, to the West One Half of said ¼ Section Patent No. 484487; and to the South East Quarter of said ¼ Section, Patent No. 485834; and on August 6, 1915, Patent No. 485833 to the North East Quarter of said ¼ Section.

V. In order to show how the mistake of law and how the bias and prejudice herein alleged arose and functioned in this case, plaintiff will further allege and explain, referring, in order to more clearly described the situation, to the map which is annexed to plaintiff's amended bill of complaint, filed May 10, 1917, and made a part of this bill of complaint. The land to which this complaint relates (marked * on map) together with such other lands as are

shown on map, make up a valley tributary to the Colorado River,
(shown on eastern boundary) in a region where cultivation
4 and such good faith residence as is required by the home-
stead laws of the United States, is entirely dependent upon
the reclamation of the land by irrigation. In order to enable home-
stead entrymen to make such residence and cultivation on such land,
and for no other reason, Congress passed "The Reclamation Act"
June 17, 1902.

VI. In making field examination for the purpose of locating pos-
sible reclamation projects, reclamation officers of the government
found the valley shown on map, comprising about 60,000 acres of
government land shown in western part of map, and about 40,000
acres of land in a single private estate, lying between the govern-
ment land and the river and intercepting the flow of water from the
river, the estate land designated on the map as the "Blythe Rancho."
They found a ditch which before his decease, the estate owner had
constructed as shown in the northern part of the map (the fall of
the land being in the direction of the arrow) being the same ditch
now used to reclaim by gravity flow both the "rancho" lands and
the government lands adjoining, and only then needing re-opening
and extension to enable the reclamation of all the valley lands in-
cluding the lands afterwards withdrawn, with less pro rata expense
than any project the government has ever undertaken, and in full
view of these facts and under no misapprehension as to any, a
5 "second form" reclamation withdrawal was recommended and
accordingly made, July 17, 1902.

VII. Such form of withdrawal permitted homestead entries only,
and by the terms of the reclamation law under which withdrawal
was made, the Secretary of the Interior as the agent of the govern-
ment, offered and contracted with entrymen accepting the special
conditions of such entry, to construct a system for the reclamation
of the land provided only that its reclamation was feasible, and to
proceed diligently to determine such feasibility. Because of the
special conditions offered and contracted by the Secretary, the plain-
tiff accepted the conditions and made entry as aforesaid, at great
sacrifice of other opportunity, and but for the special conditions thus
offered and accepted, such entry would not have been made.

VIII. Plaintiff was then able and willing to perform his part in
the proposed reclamation of the land, and gave evidence of his wil-
lingness and of his good faith intentions to comply with all the
provisions of the homestead and reclamation laws by establishing
residence upon the land entered within thirty days thereafter, taking
work stock and tools thereon, improving, clearing and preparing the
land for cultivation for the purpose of co-operating with the govern-
ment as contracted, but plaintiff was not then able or prepared, or
had reason to believe he would be required to reside upon contin-
uously and cultivate the land until such time as some form
6 of reclamation of the land were possible, if denied both gov-
ernment aid and opportunity of community or any other aid.

IX. About this time said private estate lands passed to the ownership of a corporation called "The Land and Water Co.," and thereafter the government's duty of diligence and cost reclamation of the entryman's lands was yielded to the company's desire to exploit the settlers' needs for profit, no reclamation of the land being attempted under authority of the government at any time, although the second form reclamation withdrawal was changed to a first form withdrawal and so continued for seven years, and in addition all the unappropriated waters of the Colorado River, which was the only source whereby the lands entered might be reclaimed and rendered habitable, was appropriated under authority of the Secretary of the Interior.

X. A first form reclamation withdrawal is of that class that precluded the further initiation of new rights of any kind or character, it is authorized to be made by the reclamation act only where such progress has been made with the reclamation project that the Secretary is assured water for the irrigation of the land may be had within a reasonable time, after becoming ready to contract for the construction of a reclamation system, and after becoming ready to give notice of the lands irrigable under the project. With only a part of the public lands entered prior to this withdrawal, in default of government aid, and with the entered land deprived of opportunity to appropriate water, such withdrawal made the entrymen entirely dependent upon the pleasure of the corporate owners of the intervening land as will plainly appear by the map. As such corporate owners did not then choose either to use the ditch or to permit its use by others, plaintiff, and other entrymen, had no option but to gain sustenance from other lands till such time as it became possible to reclaim and thus cultivate the lands entered, absence of plaintiff, however, being at no time greater than six months, except as granted leave by the land department, and immediately the Land & Water Co. re-opened the old ditch shown on map, though ditch was not near plaintiff's claim, and the company was then loth because of lack of plan, to furnish water to settlers, plaintiff purchased the company's reluctant consent to connect with its ditch, plaintiff making such intervening ditch over government land in order to do so, and thereafter reclaimed, cultivated and improved the land according to intentions never abandoned since making entry.

XI. As a condition of its lawful and logical status under first form withdrawal, all contest rights and privileges pertaining to the homestead law were cut off by the operation of the withdrawal without regulative action of the land department, but mistaking the law and ignoring the law and the obligations contracted and equity considerations existing with entrymen, the land department attempted, on June 6, 1905, to separately provide by regulation for the consideration of contest rights and privileges, but with greater right and privilege than the law did or could provide, to-wit, the right of consideration as a quiescent, non-existent right until such unknown future time as the land might, by its changed status,

become subject to the initiation of right, limiting such future claim of right, however to the jurisdictional status of the land at such future time.

XII. Thereafter it becoming known to defendant through his friendly relations with certain land department officials that the aforesaid conditions had forced entrymen to exhibit technical flaws in the matter of residence and cultivation of the lands entered, and proceeding on the advice and assurance of such certain officials, defendant sought to take speculative advantage of the plight in which the prior entrymen had been placed, by contesting, under the provisions of the regulations aforesaid, a number of entries, including the entry of plaintiff, for the purpose of selling the preferred rights supposed to be appropriable under the regulations aforesaid. Accordingly contest notice was served on plaintiff May 5, 1908, affidavit of contest stating that plaintiff had never established a residence, or made any improvements, and that he had abandoned the land for more than six months.

9 XIII. At the hearing of said contest it was found, conceded and established without dispute that plaintiff had established residence, had made improvements, that any lack of cultivation or absence happening was due to the conditions as "herein shown was not to the changed intentions of plaintiff, that instead of having abandoned the land, he was residing on, reclaiming, cultivating and improving it when served with contest, notice, only defendant himself alleging abandonment, and he also made oath that he did not know, and had no means of knowing the facts.

XIV. On such evidence, not then through prejudice of plaintiff, but to make good the assurances given to defendant and in aid of his speculative program, department officials decided that abandonment was proved, made no allowance for the conditions under subsequent withdrawal as affecting the prior right of plaintiff, but only as affecting the prospective right of defendant, ignored the residence, reclamation and cultivation of the land by plaintiff in powers when contest notice was served which was admitted by defendant, and recommended that plaintiff's entry be cancelled, and defendant be given preferred right of entry.

XV. Plaintiff appealed, but smarting under the injustice of such decision, and finding field agents of the department making defendant's camp their headquarters, making wrong reports concerning plaintiff, and showing partisan zeal in many ways, plaintiff
10 said, wrote and printed things about the decision, and about the department in general which field agents and other department officials collected and used to create and propagate a virulent prejudice extending to all parts of the department having to do with appeals made or to be made by plaintiff, then or thereafter.

XVI. After hearing and before final appeal, the department realized a part of the inconsistency and illegality of the regulations aforesaid, and made other regulations January 19, 1909, providing

that thereafter no contest should be allowed on first form withdrawn lands, and that in all cases where contest had been allowed, if preference right had not been used thereunder, such regulation would ipso facto terminate all right futurely promised by the prior regulations, which new regulations plaintiff urged before the department in the appeals made and afterwards pending before it.

XVII. While appeals were pending the Land & Water Co. perfected the plan by which it wished to condition the use of water by the settlers on the government land, by which plan, if uncontested, the company could have appropriated as a clear profit, so much of the current value of the land as they saw fit, and plaintiff was notified to come under this plan or have his land forever barred from the use of water.

11 XVIII. Plaintiff resisted this plan by court proceedings, as a result of which mandamus was issued, and the company was obliged to abandon the plan of collecting an unlimited bonus from the settlers for the privilege of constructing a reclamation system by cash assessment, but as a further result the officers of the company added the great weight of their influence to intensify and extend the prejudice already working within the department against plaintiff, to effect the defeat of plaintiff in the pending appeals before the land department, and to oust plaintiff's possession of the land by any possible manner.

XIX. Thereafter the first form withdrawal was vacated to the extent of permitting the establishment of settlement rights April 18, 1910, and completely vacated and thus made subject to the establishment of entry rights May 18, 1910, whereupon the land department, regardless of any preference rights claims, accepted entries of new claimants to land in the same vicinity, contested, but not by defendant, under the same circumstances as the entry of plaintiff, such entries being accepted on the stated ground that the regulations of January 19, 1909 aforesaid, had terminated further consideration of future rights on all land included in the first form withdrawal.

XX. With record evidence before it of plaintiff's priorly completed right, and of his continued residence, reclamation and cultivation of the land, with appeals and petitions pending for the
12 consideration of such right, with all these lands of a status of which the regulations of June 6, 1905 specifically disclaimed a future projection of right and contrary to its action in the identical cases cited supra, the land department on June 1, 1912, accepted homestead entry of defendant on the stated grounds of a preference right derived from the regulations of June 6, 1905, solely because of the bias and prejudice aforesaid.

XXI. With entry so procured, defendant applied to the Superior Court of Riverside County for a writ of ejectment against plaintiff, which the court, under the circumstances shown, refused to grant.

XXII. Thereafter the growing desire of defendant to deprive plaintiff of his land, and the growing prejudice of Land & Water Co., and of land department officials became consolidated into a conspiracy to cause pending decisions or future actions of the land department to be adverse to the rights of plaintiff, regardless of the merits of the case, and, after so deciding, and plaintiff still at-empting to maintain his legal rights, department of justice officials were induced to join, and, the purpose of the conspiracy becoming to injure, oppress, threaten and intimidate plaintiff in the free exercise and enjoyment of the right and privilege secured to him by the Constitution and the laws of the United States, to continue his residence upon,
and the cultivation of, until patent issued or until dispos-
13 sessed by the judgment of a competent court, the land entered
and appropriated by him as a homestead, department of justice officials consented to loan the criminal processes of the government to shield and protect defendant from civil suits then or thereafter brought against him by plaintiff, and to hamper, harass, impede and prevent plaintiff from protecting his right to the possession of the land, or his right to the title thereto, in any court proceedings thereafter and including the present proceeding.

XXIII. In pursuance of said conspiracy and to effect and accomplish the object thereof, by advice and counsel of land department officials, and with criminal proceedings already planned in anticipation of resistance by plaintiff, defendant, on November 25, 1912, forcibly entered upon and attempted to take possession, without leave of the court, of the land herein described, then improved, reclaimed, occupied and cultivated by plaintiff, and then in his peaceful and lawful possession; whereupon, on proper complaint, warrant, trial and judgment, defendant was removed by the peace officers of the State acting in their official capacity, plaintiff taking no personal action therein.

XXIV. Thereupon, defendant wiring the U. S. District Attorney, a deputy United States Marshal was dispatched who arrested plaintiff,
and after a period of imprisonment, took him before an as-
14 sistant U. S. District Attorney, who demanded as the condition of release, that defendant be permitted to take possession of the land then in possession of plaintiff as aforesaid, that any pending court proceedings be dismissed, and future court complaint not made.

XXV. Said assistant attorney reported to the land department at Washington, where appeals of plaintiff in the land decisions was then pending, that plaintiff had been arrested for driving defendant off the land by force and violence, and had been released on his promise to vacate the land forcibly held by him, and to dismiss all actions then pending in the local courts. Subsequently a land department official, representing to act in his official capacity and alleging positive knowledge that the decisions then pending in the land department would deny the right of plaintiff, demanded with heat that plaintiff vacate and permit defendant to assume possession of the land.

XXVI. Thereafter, the U. S. District Attorney so intimidated the local court by letter that the justice thereof made private and verbal statement to defendant rescinding the trial judgment aforesaid, whereupon defendant again forcibly assumed possession of the land, plaintiff again proceeded against him before another court, and was again arrested and was prosecuted as a criminal for so doing, the assistant attorney leading stating to the court that the proceedings were had according to the ideas of the land office, a land office
15 official assisting throughout, and, at the solicitation of the land department, the assistant Attorney General from Washington, D. C. attended and assisted in the prosecution, appearing as the special representative of the land department. By the methods used in such prosecution, the relation of which is not necessary to this complaint, by manufactured evidence, and by the character of the reports constantly circulated through the "Los Angeles Times" concerning plaintiff, plaintiff was convicted as a criminal and made to serve time thereby, and, through the expense of defense and the interference with industrial opportunity for a long period of time while family expenses continued, plaintiff became bankrupt, unable to properly protect himself in the litigation brought against him by defendant, and unable now to properly conduct this suit against defendant.

XXVII. While the aforesaid criminal proceedings were pending, the land department rendered decision in the appeals of plaintiff then pending, denying the right of plaintiff and upholding the claim of defendant, whereupon, exhibiting such decision, defendant again applied to the Superior Court of Riverside for ejectment of plaintiff, and plaintiff being then harassed, intimidated and bankrupted by the aforesaid criminal proceedings, and unable to interpose proper, or any, defense, ejectment followed, as a result of which, and for no other reason, plaintiff has ever since and does now reside elsewhere.

16 XXVIII. With the withdrawal vacated, the lawful right of contest restored, the land reclaimed by the efforts of plaintiff, with defendant in possession but making no attempt to cultivate it, plaintiff made application to the land department to contest the entry of defendant, alleging failure to establish residence, failure to cultivate, and that defendant's alleged preferred right was obtained and entry made for the purpose of speculation, and not for a home, serving notice on defendant at the time of such application and the grounds.

XXIX. Said contest application was rejected on the ground that the charges were mere conclusions which plaintiff must not be allowed to determine. Plaintiff appealed.

XXX. One of the reasons urged by plaintiff in the course of his several appeals before the land department, why defendant should not be permitted to claim the land to which plaintiff had completed claim was, that defendant at the same time claimed other land by homestead, which, as a reason for freeing the land of plaintiff from the claim of defendant, the department would not consider; later,

heeding the claim of another wishing to make entry on such other land, the department cancelled the claim of defendant to such other land on account of such dual claim, and accepted the claim of such other claimant, under which entry such other claimant made large outlay and greatly improved the land.

17 XXXI. Thereafter, and in view of the contest notice served upon defendant as aforesaid, defendant solicited the department to cancel the entry of such other claimant, restore defendant's status to such other land, and accept new locations of Soldiers Additional Scrip in place of the entry plaintiff had applied to contest, all of which was done, and without hearing of any other claimant, scrip application being made March 6, 1914, and homestead entry relinquished March 9, 1914.

XXXII. Such scrip locations require publication and thirty days within which protestants may intervene, plaintiff made protest within thirty days, in due form, under oath, alleging his prior and completed right to the land and pending applications for consideration. On inquiry plaintiff was informed by the Registrar of the land office, that he would not approve of defendant's scrip applications in view of the known rights of plaintiff and his protest thereon. To prevent the Registrar from sustaining the protest of plaintiff, some other incumbent of the land office transmitted the scrip applications of defendant to the General Land Office at Washington, before the Registrar had opportunity to take action thereon, and destroyed the protest of plaintiff; thereafter the General Land Office approved said scrip applications on the report of the Chief of the Field Division that no protest had ever been made against said applications.

18 Every effort of plaintiff to get a hearing on his protest was denied. Motion for reinstatement of his entry was denied. Petition for exercise of supervisory authority as to all of plaintiff's prior claims was denied. Application to contest, pending on appeal, was denied on motion of defendant's attorney, made after defendant relinquished entry, for the stated reason that plaintiff had not served defendant with copy of appeal. Plaintiff applied for re-hearing on the ground that an application did not require service on party until application was allowed. Department admitted no service was required in mere application, but decided application should be denied on the ground of insufficiency.

XXXIII. In all the litigation before the land department and between plaintiff and defendant extending over a period of several years, no service was ever made upon plaintiff of any paper used or process taken by him or his attorney, save and except the aforesaid application, in which defendant had not yet become a party entitled to notice, but in which he had become a stranger to the past record of the land by reason of filing his relinquishment, thereof, and therefore in which he was not entitled to be heard. In all other cases the department has permitted him and his attorneys to file briefs, statements, and private and confidential letters to the individual examiners in charge of these cases, and has considered and allowed his

claims, without service or evidence of service of any one of
19 them upon plaintiff.

XXXIV. Plaintiff alleges that the acts of the land department as herein shown, are contrary to the spirit and intent of the Constitution, and against the laws of the United States, are violative of all principles of equity, justice and fair dealing, against public policy, and shows to have been here applied through bias and prejudice culminating in a conspiracy; that while the right of plaintiff was before the department for adjudication, the department has shown so seized with its own animosity, and so burdened with the animosity of others, as to be incapable of rendering a just judgment. Plaintiff alleges that the department has proceeded squarely against law in refusing to consider the right of plaintiff to complete his claim under first form withdrawal to land entered and settled upon before such withdrawal, regardless of the alleged claims of any person claiming to have secured rights pending the withdrawal, and plaintiff having completed right under the withdrawal, the department is entirely without authority to refuse to consider it.

The department has proceeded squarely against law in attempting to legislate by regulation as to matters not concerning reclamation, but working only to provide defendant with privileges and benefits not obtainable by plaintiff, and subjecting plaintiff to penalties and exactions not required of defendant.

20 The department has proceeded against law and public policy in assuming authority to impair and abrogate existing contracted obligations with plaintiff, in order to assume future obligations to defendant.

Plaintiff alleges that in all of the acts of the land department herein shown, it has proceeded directly against the rule established by a long line of decisions, and against its practice at the time in other identical cases.

Plaintiff alleges that in soliciting and securing the use of the criminal processes of the government to deprive plaintiff of his constitutional right to remain on the land entered until patent issued, or until dispossessed by the judgment of a competent court, and in taking active part in such criminal proceedings while the rights of plaintiff were before the department for consideration, the department has given evidence of the most extreme prejudice and partisan intent, which intent is further evidenced by its decisions as herein shown. Plaintiff alleges that if these mistakes of law, and this bias and prejudice here shown, and the voluntary and involuntary fraud to which plaintiff has been subjected, had not been the controlling factors in the case, patent would have issued to plaintiff, and not to defendant.

Wherefore plaintiff prays that he be declared the real owner of all the real property described herein, that defendant be declared a trustee holding the series of patents issued to him by the land de-
21 partment of the government, for the use and benefit of plaintiff, and that defendant be decreed to transfer proper evidence of title to plaintiff, and to account to plaintiff for the rents, issues

and profits realized while holding the premises as such trustee, and that plaintiff have such other relief as may appear to the Court to be proper.

WILLIAM B. EDWARDS,
Plaintiff."

"Answer of the Defendant.

Comes now the defendant in the above entitled cause and answering plaintiff's complaint and the amendments thereto, and by way of defense, states:

I.

The defendant admits that plaintiff is a citizen of the United States residing at Redlands, California, and that the defendant is also a citizen of the United States, and each residing within the Southern District of California, and within the jurisdiction of this Honorable Court; and that the land described in plaintiff's complaint is situated in Riverside County, California, and that the defendant now holds the legal title thereto by virtue of a patent or patents granted to him by the Land Department of the United States government, and that the land in controversy exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs; but this defendant expressly denies that the patent or
22 patents so held by the defendant to said land, was or were granted to him by the Government of the United States through error arising from the Land Department's wrong construction of the provisions of the constitution or the laws of the United States, or of the Department's authority or jurisdiction thereunder; and this defendant admits that Congress has provided laws for securing title to the unappropriated lands of the United States known as the "homestead law," under which the entryman is entitled to receive patent to the land after residing on, or cultivating the land, in the manner as required by the Acts of Congress and the rules of the Department of the Interior; but denies that the land in controversy was, or is, such land.

II.

Admits that free homesteads were given by the Government to citizens of the United States provided there was a compliance with the laws of Congress and the Land Department of the United States relative to taking up said homestead; but denies that the plaintiff was entitled to take up the land described in his complaint, or file thereon, or is now entitled to such a right.

III.

Answering paragraphs III and IV of plaintiff's complaint, defendant states: That he admits that one of the provisions of the law

was and is that the intentional abandonment of the land entered, or the lack of good faith of the entryman, might and should
23 secure the cancellation of said entry for the purpose of allowing the land to be entered by the person so securing the cancellation; but states that the person so securing the cancellation was entitled to a preference right by reason of his said contest, and was thereby accorded a greater privilege by reason of his successful contest, and that the Government in executing the Land Laws has recognized these fundamental principles consistently at all times; but denies that the duties of the Land Department was purely ministerial, or that their rules and regulations are not subject to change to the injury of any party or parties.

IV.

This defendant denies that a withdrawal of the land from entry for any purpose took it beyond the operation of the land laws, or precluded the initiation of any right within such land to the area withdrawn; or that no initiation of right to enter land could take place in advance of the eligibility either of the land to entry, or the right to make entry; or that where default might have happened the entryman had a right to cure the default at any time before notice of contest; or that the relinquishment of an entry ended all priority possessed by such entryman, or any subsequent attempt by him to gain title to the same land by a new entry subordinate to the prior claim of every other claimant on record; or that where relinquishment is filed pending contest it was or will be presumed
24 as a matter of law or fact that such relinquishment was produced by the contest.

V.

Answering paragraphs VI, VII, VIII, IX and X of plaintiff's complaint, defendant states: That he admits that Congress, on or about June 17, 1902, passed what is known as the "Reclamation Act," and that the Act gave to the Secretary of the Interior of the United States authority to make two forms of withdrawals of land; but further states that by said Act the Secretary of the Interior was given full authority to make all needful, useful and proper regulations to carry the purposes of the act into full force and effect; and admits that the second form of withdrawal permits homestead entries on the land withdrawn; and this defendant states that he at all times complied with all of said laws, rules and regulations; and this defendant admits that the obligation was imposed upon the Secretary of the Interior and on the entryman to proceed diligently with surveys to determine the feasibility of reclaiming the land should reclamation be found feasible or proper, and if found impracticable or unadvisable in the opinion of the officers of the Land Department, to restore the land to settlement and entry under the existing laws of the United States and the regulations of the Secretary of the Interior.

VI.

Admits that the Secretary of the Interior on or about July 17, 1902, withdrew, under such second form, an area of land em-
25 bracing the North East Quarter of Section Eleven (11), Township Seven (7) South, Range Twenty-two (22) East, S. B. M., and the defendant admits that on or about December 1, 1902, the said land was unappropriated public land of the United States; but denies that the same was subject to settlement or entry under the homestead laws, or that plaintiff was qualified in every way, or in any way to make or perfect an entry on said lands, or that he made homestead entry on said land on said date solely because, or because of his belief that the reclamation conditions under which entry was made constituted a contract, or with the good faith or belief that the execution of said contract, or any duties imposed thereunder was cast upon the Secretary of the Interior to in any way carry out any contract with the plaintiff permitting him to enter or appropriate said lands.

VII.

Denies that plaintiff was then able or willing to perform his part in the proposed reclamation of the land, or gave evidence of his good faith and intentions to comply with all the provisions of the homestead or reclamation laws by establishing residence upon the land within thirty days after making entry thereof, by taking work stock or tools thereon or improving or clearing or preparing the land for cultivation for the purpose of co-operating with the government in the reclamation of the land under the terms of the reclamation
26 law, or the conditions upon which entry was made, or that plaintiff was not then able or prepared, or had reason to believe he would be required to reside upon continuously, or cultivate the land, or that he was denied both government aid, or opportunity of community aid to such reclamation.

VIII.

Denies that after making said second form withdrawal the Secretary of the Interior negligently failed to observe any of the obligations assumed by making such withdrawal, or that no reclamation by government authority was begun, or diligently exercised to determine the feasibility of such reclamation, or that with no reclamation purpose under way the Secretary of the Interior again assumed authority under the Reclamation Act, or without authority made a first form withdrawal of an area embracing said land on September 12, 1903. Admits that a first form withdrawal of the land was made on September 12, 1903, by the Department of the Interior; but denies that such withdrawal took the land withdrawn beyond the operation of the Land Laws in so far as regarded the initiation of any new rights thereto, or deprived the Secretary of the Interior

of authority to provide for and preferred or contingent disposal of land within the area withdrawn.

27 IX.

Denies that at the time of the making of the first form withdrawal of the land the Secretary of the Interior had negligently failed to bring the land within any of these conditions mentioned by plaintiff, or that no reclamation determination had been made, or that no contracts had been let or offered or no public notice of the lands irrigable under the project was given then or ever.

X.

The defendant having no information or belief upon the subject sufficient to enable him to answer and placing his denial thereon, indenies that the failure of the Secretary of the Interior to proceed with any purpose for which withdrawal was authorized was not due to any physical impediment or engineering obstacle to the reclamation of the lands withdrawn, or that the practical feasibility of reclaiming by irrigation the entire area of land so withdrawn, including the land herein described, was at all times plainly evident. Denies that the negligence or failure of the Secretary of the Interior either to proceed with the reclamation of the land withdrawn, or to proceed in the matter of withdrawal according to the terms of the reclamation law deprived plaintiff herein of both Government aid, or of opportunity at that time of community aid, or greatly impaired his opportunity to fulfill the obligations which his faith in the agencies of the Government had induced him to undertake.

28 XI.

Denies that after great effort plaintiff became able to overcome said impairment, or any impairment, or that he thereupon proceeded to improve, or reclaim, the land according to his original intention, or that he reclaimed, or successfully cultivated a greater area without Government aid, or that he was in any way handicapped or injured unlawfully by said withdrawal, or any withdrawal of said land.

XII.

Admits that on or about June 6, 1905, the Secretary of the Interior, or the Department of the Interior, made certain regulations in regard to land embraced under a withdrawal under either form, and states that under said regulation an entry of said lands might be contested and cancelled because of entryman's failure to comply with the law, or for any other sufficient reason; and this defendant denies that contrary to the legal status of the land under the withdrawal, he was permitted to initiate*d* contest against the entry of the plaintiff, but admits that defendant's affidavit of contest charged that the de-

fendant had never established a residence on the land, or made improvements thereon as required by law, and that he had been absent from said land for more than six months last passed; and that a hearing of said contest was had under the rules and regulations of the Land Department of the United States; but denies that the
29 hearing of said contest was had as though the land entry had not subsequently been made subject to a complete or isolated withdrawal, or as though no change had been made in the contract conditions under which the entry was made, or no effect of the changed conditions produced by the withdrawal was considered as effecting this plaintiff as entryman making a strict and literal compliance with every requirement of the homestead law; or that said contest was so had as only affecting the prospective technical right of the defendant as contestant, or as relieving the defendant from any requirements or performance under the conditions; or that at the contest trial it was found, or conceded, or established without dispute that the entryman, the plaintiff herein, had established a residence, or had made improvements, or that the improvements made before notice of contest was better than the average, or that any lack of cultivation or absence happening was due to the subsequent suspension of opportunity occasioned by the first form withdrawal of the land; or that at the time the plaintiff as such entryman was served with contest notice he was actually residing upon the land as required by law, or that he was then or for some time prior thereto had been, busily engaged in improving or reclaiming, or cultivating it according to his original intention; denies that notwithstanding the evidence or things as set up by the plaintiff, or the condition of withdrawal then obtaining, the register or receiver either
30 mistaking the law or ignoring the precedents established or hitherto observed by the Department, recommended that the entry of the plaintiff might be cancelled in order that this defendant might secure such preferred right as was presumed to be provided by the regulations of June 6, 1905.

XIII.

Admits that plaintiff herein appealed said decision of the Register or Receiver to the General Land Office at Washington; but denies that while the appeal was pending or undecided, the Secretary of the Interior recognized or admitted in terms that the regulations under which this defendant had been permitted to initiate this or other contest to withdrawn land was unnecessary to any purpose of reclamation, or illegal, or "never should have been made," but states that if any regulation was made on January 19, 1909, or at any other date subsequent to the regulation of 1905 hereinbefore referred to, that the same did not apply to this defendant, nor the land to which, or upon which, he had been permitted to make entry under his preferred right, and that if any such regulation was made, which took away or attempted to take away any rights of this defendant theretofore acquired by his preference right and entry, that the same would not be binding upon this defendant; but the defendant states that no

regulation was made in any way on January 19, 1909, or at
31 any other time in any way changing or destroying the rights of this defendant theretofore acquired.

XIV.

Denies that the plaintiff, having by great effort overcome the hampering conditions subsequently imposed on him as specified in his complaint, proceeded to complete, or completed in generous measure every requirement of the homestead law, or made final proof of the fulfillment of such requirements according to the provisions of the homestead law, before the Register or Receiver at Los Angeles; or that he properly proved such compliance by two creditable witnesses, or showed a reclamation or cultivation in excess both of the general homestead and reclamation laws requirements as required by law; and denies that his said proof was not rejected for deficiency or insufficiency, or was not considered in any way, or that the department refused the plaintiff a fair and impartial hearing according to law and the rules and regulations of the Land Department, or that they have failed to give plaintiff a reason for not awarding to him the said land.

XV.

Denies that the Department officials, acting on the plaintiff's said case, or his appeal, mentioned by plaintiff, made any errors of law, or disregarded precedent, or wrongfully sustained the decision of the Register and Receiver at Los Angeles; or that under officials exercising the authority of the Secretary of the Interior wrongfully
32 acted on his said appeal, or made any errors of law, or disregarded precedent in any way; but admits that plaintiff's entry on said land was cancelled on or about April 19, 1909; and states that at said time, under the Preference Right Act of Congress of 1880, and the rules and regulations made in pursuance thereof, this defendant had acquired said land and the right to a patent thereto which was a valuable right, and all in pursuance of said law and the rules and regulations of the Department of the Interior and the Acts of Congress relating thereto.

XVI.

Denies that during all the time said contest decisions were pending, or after making final proof as claimed by plaintiff, or after cancellation of his first entry as stated by plaintiff, he continued to reside upon the land, or to improve, or reclaim, or cultivate it according to his original intentions, or that he was the sole settler on or possessor of the land, or entitled to a preferred right of second entry according to the land laws of the United States on May 18, 1910, if he should choose to make a second compliance or any compliance with the requirements of the homestead law; and while the defendant admits that the land in controversy was released from withdrawal, he denies that the same was released from every form of claim derived or estab-

lished under the Reclamation Act; or that the same was there-
33 after subject only to the general land laws of the United States, or to the rights provided by those laws.

XVII.

Denies that the plaintiff intended, or always intended to make the land entered, or attempted to be entered, his future home, or that he had no desire to skimp the extent of residence, or amount of cultivation, or any other requirement of the homestead law; and denies that when plaintiff made application before the Register and Receiver for second entry, he had any right to the preferred right of second entry as a settler under the general land laws, or that plaintiff's application for second entry was wrongfully withheld by the Register and Receiver until June 3, 1912; but states that said entry was lawfully withheld by the Acts of Congress and the Rules and Regulations of the Land Department of the United States; but denies that during all of said time plaintiff continued to reside on the land as theretofore, or that theretofore he had continuously resided on the same, or had improved, or reclaimed, or cultivated it according to his original intention, or according to the provisions of the homestead laws; or that during all of said time no other claimants settled upon, or improved part of the land, or gave evidence of intention, or wish so to do; or that regardless of the existing settlement, or occupation, or entry of the land by the plaintiff, the Register or receiver on June 1, 1912, accepted the applica-
34 tion of this defendant to homestead the same land, but admits that on or about said date the said Register and Receiver rejected the application of the plaintiff; but denies that the same was without a hearing, or without evidence, or contrary to law, or to the precedents of the Department.

XVIII.

Admits that plaintiff appealed said decision of the Register and Receiver to the Commissioner of the General Land Office, and to the Honorable Secretary of the Interior; but denies that neither of said officials considered the appeals, or that the decision was made by others; but admits that the decision of the Register and Receiver was sustained in each case; but denies that any error of law or disregard of precedent was made by either of said officials, or anyone acting for them, or that they stated as a reason for their decision the "disposition" of the Department; but the defendant states that the decision of said Commissioner and the Secretary of the Interior was in accordance with the laws of the United States and regulations of the land Department of the United States, and the decision of the said Secretary of the Interior was final, and fully and finally adjusted and settled the claims and rights between the plaintiff and the defendant as to which should be entitled to said lands.

XIX.

Defendant denies that he applied to the Superior Court of Riverside County for a writ of ejectment which was refused to him, or that the defendant without leave of the Court forcibly assumed possession of the land either possessed, or improved, or reclaimed, or cultivated by plaintiff; and this defendant expressly denies that local Land Department Officials joined with defendant to induce Department of Justice Officials to lend the criminal processes of the law in aid of defendant, or that the same was done, or that plaintiff was arrested or put in jail for complaining to peace officers of the State, or for the ejectment of defendant by the official acts of such officers, or that plaintiff was prevented by such criminal proceedings, or any criminal proceedings, from appearing before the Department at Washington at the time set for said re-hearing or oral argument, or that defendant only was free to go; and denies that plaintiff abandoned said, or his improvement thereon, or failed to cultivate the same by reason of any wrongful act of defendant or anyone acting for him; this defendant denies that plaintiff appealed the decision of the Superior Court in Riverside County, granting writ of ejectment against the plaintiff, or that said appeal was perfected at all; or that during all of the time or any of the time the requirements of the homestead law had been completed, or were completed by the plaintiff, or that the Land Department wrongfully recognized the claim of the defendant, or that the Superior Court of Riverside County, on the supposed legality of any action of the Land Department granted a writ of ejectment, or that the defendant on March 9, 1914, or at any time relinquished his homestead right to the land from which plaintiff had been ejected except in the manner provided by law.

XX.

Denies that the defendant made no good faith effort to comply with the requirements of the homestead laws of the United States; and denies that the plaintiff made his contest charges plain or specific. Denies that the plaintiff was prevented by judicial compulsion from completing a claim under second entry, or that plaintiff was denied any right to which he is entitled, or was denied any right of consideration for any reason; and denies that there was any ex parte petitions, or applications for the consideration of the Land Department on the part of this defendant, or any applications other than that authorized by the laws and regulations of the Land Department; and denies that the defendant offered any scrip covering the lands in opposition to the prior claims of plaintiff, or requested the Department to make haste or dismiss the pending claims of plaintiff in order to clear the record for the acceptance of the new claim of the defendant; and denies that the plaintiff duly filed with the Register and Receiver his written protest under oath against the allowance of said scrip locations, on or about April 1, 1914; and denies that plaintiff's

protest was eliminated fraudulently, or that the Register of
37 the local Land Office stated that the protest had been for-
warded to the General Land Office by clerks in the local office
and without waiting for action by the Register and Receiver, or that
the new locations of defendant had been approved for patent on the
report of local department officials that no protest had been made
against such locations. Denies that the several actions, or any action
of the Land Department, whereby the claims of the plaintiff were
refused or rejected, was due to any extent to an erroneous theory that
the Department has or had assumed of its authority and jurisdiction,
or to any extent to the partisan determination of certain department
officials to permit this defendant to secure title to the land herein for
any reason or for no reason, or to deny the right of plaintiffs to the
same land for any reason or for no reason, or that any partisan deter-
mination was propagated, or instigated, or participated in by this de-
fendant by any confidential or secret means, or otherwise, or that
thereby a bias or prejudice of the Department was produced against
this defendant. Denies that by reason of any erroneous theory of
authority, or jurisdiction held by the Department, or the condition
of bias or prejudice existing, plaintiff has not been able to properly
exhibit his case before the Department, or to get a fair trial of the ex-
hibits made; but states that plaintiff has at all times had a fair trial
before the different land departments of the Government, and states
that his appeals, and motions and petitions were refused or
38 rejected or denied by right, and under authority of law and
regulations of the Land Department; and denies that plaintiff
has no other remedy for his alleged claims against this defendant;
and denies that this defendant knew of any prior or legal appropria-
tion, or improvement of said land by the plaintiff made in any law-
ful manner. Denies that all or any of the actions of the Land De-
partment complained of by plaintiff were grossly or notoriously il-
legal or inequitable, or could convey no legal or equitable right to
the defendant, or that in taking the action they did, the Department
officials mistook or misapplied the provisions of the homestead or the
reclamation laws of the United States, or disregarded the principles
of the Constitution, or of equity or of justice, or through a partisan
bias or prejudice applied the law to the uncontroverted facts and con-
ditions of the case contrary to the law's intent, or contrary to the pre-
cedents at all times theretofore followed by the Department, or that
such errors indicated or specified were committed in any way. De-
nies that the land department permitted the defendant to contest the
entry by plaintiff for alleged default after the department had itself
defaulted in every particular, or in any particular of its contracted
obligations to plaintiff, or had subsequently so changed conditions as
to impair to the point of destruction the opportunity of plaintiff to
proceed or contest proceeding without consideration or excuse
39 to plaintiff as entryman under the changed condition, or
otherwise; or that the Department provided to excuse the de-
fendant from any requirements under existing conditions. Denies
that the act or acts of the Land Department were grossly or noto-
riously illegal or inequitable by assuming that the preferred recog-

nition of the right of the defendant, or claimants of his exclusive class, to initiate rights to withdrawn land was necessary to the purpose of reclamation. Denies that the Land Department was grossly or notoriously illegal or inequitable in assuming that paragraph- six and seven of the regulations of June 6, 1905 projecting a prospective right of defendant at such future time as the withdrawal might be effective provided defendant with a right existant pending the withdrawal, or before such projected future time, which was a bar to the completion of the right of plaintiff, or that the Land Department erred in permitting the defendant to make entry of the lands after vacation of the withdrawal order. Denies that the Land Department erred in making a first form withdrawal of an area of land embracing the land described in this action, after first having made a second form withdrawal embracing said land or accepting entry thereunder, or by making such first form withdrawal before any progress had been made under the second form withdrawal to assure water for the irrigation of the land withdrawn, or that the Land Depart-
40 ment used the resultant circumstances, or any circumstances to discriminatively provide advantage, or provide to the defendant, at the expense or loss of the plaintiff. Denies that the Land Department erred by arbitrarily extending on the sole authority of its land decisions an alleged right of this defendant claimed by authority of the regulations of June 6, 1905, or that said regulations had been set aside or superseded by the regulations of January 19, 1909, or by decision, or that said Department erred in making such preference right prior or superior to the right obtainable by the plaintiff under the general land laws to land subject to those laws, or to no delegated reclamation authority of the Department. Denies that the Land Department erred by permitting the defendant to contest the reclamation entry of plaintiff for alleged abando-ment prior to the time the first form withdrawal was vacated, and prior to the time the Government was ready to furnish water for the reclamation of the land entered; or by holding that the defendant could by any contingency initiate a right in advance of the eligibility of the land to the initiation of new rights; or by deciding that the allegations in defendant's contest affidavit were proven; or by failing to decide that any alleged default of this plaintiff was well cured long before notice of contest; or by not ordering a hearing before accepting the entry of defendant to determine if plaintiff had a preference right of second entry under the general land laws as claimed; or by not hold-
41 ing that any alleged right of this defendant ended with the relinquishment of the allowed entry of defendant, or that all pending claims of plaintiff were thereby rendered ex parte, or entitled to ex parte consideration; or by not holding that as the plaintiff had attempted to hold two quarter sections by homestead at the same time, or had elected to relinquish his allowed entry to the land herein described, that his homestead right, if any, was at all times upon such other land, or was never at any time a valid homestead claim to the land entered; or by refusing to consider, or fraudulently eliminating the protest of plaintiff to the scrip locations of defendant; or by making decisions based on "disposition" or not on law; or

by accepting the claims of this defendant, or in passing such claims to patent for any existing reason whatsoever, or by rejecting the claims of plaintiff, or by denying patent to him to said lands.

XXI.

Having no information or belief upon the subject sufficient to enable defendant to answer, and *plaing* his denial thereon, he denies that at the time the first form withdrawal cut off further entries, only a part of the area withdrawn had been previously entered, or that all of such entries were made in confident expectation of Government aid to reclamation; or that to enable entrymen to reasonably undertake such reclamation, it was absolutely necessary that
42 co-operative opportunity be not restricted, or that because of such restriction by the subsequent first form withdrawal of the land, nearly all the original entrymen were forced either to abandon the land entirely or to maintain a merely constructive residence thereon, or that this subsequent condition of suspension, or isolation could not have been forseen or provided against by the entryman; or that these conditions caused many entries to reach a condition that would have constituted a default were the conditions unchanged. This defendant denies that he proceeded to take speculative advantage of the circumstances by initiating wholesale contests, or by yielding his many mooted rights thereby as opportunity offered for a consideration; or that his alleged right to the land claimed by plaintiff remained unsold only because no takers appeared caring to purchase a right to land possessed or improved by another; or that defendant stood idly by, or witnessed the improvement of the land by plaintiff for years without indicating any wish or intention to settle upon the same or claim or improve the same, or because to do so would be notice to the world of abandonment to other land claimed by the same form of right; or that defendant attempted to use any opportunity of exacting a profit for the abandonment of a right to land. Defendant denies that the Land Department while permitting defendant to contest the entry of plaintiff or others for alleged default, or while presuming that time
43 under the withdrawal must run against the entryman, but not against the contestant, they recognized or held in other cases that irrigation enterprises other than those established by the Government were necessarily co-operative; or that a first form withdrawal of the land by limiting co-operative opportunity was a case of active interference by the Government preventing success of a private enterprise, or that the law provided in such cases that the entrymen were not obliged to do more until the Government had ceased its interference by abandonment of its project, or had so far developed it that entrymen could get water; or that the Department had proceeded in this case with knowledge that it was the intention of Congress at all times, or was expressed by its laws that land entered under the Reclamation Act should not be subject to contest for abandonment until the proposed system for reclamation was completed or water turned into the canals.

XXII.

Defendant denies that by reason of any error or errors of law or the partisan or arbitrary treatment of the facts, or by reason of an improper exercise of discretion, a series of patents has been granted by the Land Department to this defendant to the West Half (W. ½) of N. E. ¼ of Section Eleven, (11) Township Seven (7) South, Range Twenty Two (22) East, S. B. M., July 28, 1915, patent No. 484487; or to the South East Quarter, (S. E. ¼) of N. E. ¼ of said section, on July 28, 1915, patent No. 485834; or to the North East Quarter (N. E. ¼) of N. E. ¼ of said section, on August 6, 1915, patent No. 485833; or that by reason of any unlawful or unjust, or inequitable proceedings, as set forth by plaintiff, or otherwise, said patent was issued to the defendant, or that said patent would have been issued to the plaintiff under any of the terms or conditions as described by plaintiff; or that for such errors, or any errors, or perversions of right, plaintiff has no plain, or adequate or complete remedy at law. Denies that in the contest before the Land Office, or any contest, it was found or conceded, or established without dispute that the plaintiff had established a residence, or had made improvements, or that the improvements made before the initiation of contest was better than the average, or that any lack of cultivation, or absence which may have happened was due to the subsequent suspension of opportunity by reason of the first form withdrawal of the land rather than to the changed intentions of the entryman; or that some time prior thereto, or while plaintiff was served with contest notice, he was residing upon the land, or was then or for sometime prior thereto had been busily engaged in improving, or reclaiming, or cultivating the land according to his original intentions. Denies that plaintiff was denied any rights to said land, or in said contests, or in said hearings, or otherwise, contrary to the principles of the land laws of the United States, as recognized by the unvarying precedents of the Land Department at all times thereto fore, to the effect that a withdrawal so made took the land beyond the operation of the Land Laws; or that the land Department adopted a theory of jurisdiction in this case, or any case effecting the land the subject of this suit, to provide for this defendant to appropriate a peculiarly preferred form of appropriation denominated an appropriation of the future right to appropriate land admittedly not then subject to appropriation, in order that this defendant, as a contestant, or otherwise, might evade a prohibition against appropriation; or that the Land Department, or any official of the Government, or any Department of the Government, either unlawfully, or arbitrarily, or otherwise, failed to decide the contest case of this defendant in accordance with the evidence or according to the precedents the Department had long established, or that any alleged default of the plaintiff as entryman under first entry was well cured long before the notice of contest; or that the said Land Department, or any Department thereof, permitted this defendant to contest the reclamation entry

of the plaintiff against the intentions or the laws of Congress; or unlawfully, or wrongfully permitted said contest prior to the time the first form withdrawal was vacated; and denies that the Land Department, or any department thereof, decided said contest against law or proper procedure by not holding that any alleged
46 right of this defendant, as conflicting with the existing rights of this plaintiff, ended with the relinquishment of the allowed entry of defendant, or that all existing or pending claims of the plaintiff were by such relinquishment rendered ex parte and entitled to ex parte consideration.

XXIII.

Defendant denies that when plaintiff, on or about December 1, 1902, made entry on the lands described in the complaint, that the plaintiff had made substantial, or good faith compliance with the requirements of the homestead or reclamation laws; or that no person appeared at the time or place, or offered evidence of a better, or any right adverse to the plaintiff, or that no notice was ever given plaintiff by the Land Office that the proof submitted by him was defective in any way; or that the Land Office, or the Land Office Officials in any way ignored, or mistook the law, or proceeded through a partisan bias, or prejudice, or refused at all or any times to consider proof; or that defendant was at any time admittedly without right to the land; or that plaintiff was at any time, or is now possessed with the equitable title to the land described, or entitled to the issue of patent by the Land Department of the Government, or entitled to brong suit in a court of equity for his right of title or right of possession to such land; or that plaintiff, after making proof continued to reside upon said land, or cultivated, or improved it according to his intention, or kept his claim of
47 title continually before the Land Department, or that the Land Department did not consider the appeals or petitions, or protests of plaintiff. Denies that the land department in recognition of the presumed future right of the defendant, or in acceptance of a series of scrip applications made by him March 6, 1914, unlawfully or wrongfully issued to the defendant a patent on July 28, 1915, to the West Half of N. E. ¼ of said Section, patent No. 484487; or to the South East Quarter of N. E. ¼ of said Section, patent No. 485834; or on August 6, 1915, patent No. 485833 to the North East Quarter of N. E. ¼ of said Section. Denies that Congress, in order to enable homestead entrymen to make such entry or cultivation on said land, or for no other purpose, passed the Reclamation Act of June 17, 1902. Denies that because of the special conditions offered or contracted by the Secretary of the Interior, or any conditions so offered or contracted, plaintiff accepted the conditions, or made entry on said lands, or any part thereof at great sacrifice of other opportunity, or but for such special conditions thus offered or accepted, said entry would not have been made. Denies that plaintiff was then able or willing to perform his part in the proposed reclamation of the land, or gave evidence of his willing-

ness or good faith intention to comply with all the provisions of the homestead or reclamation laws by establishing residence on the land entered within thirty days thereafter; or that he did thereby
48 take stock or tools or implements for improving, or clearing, or preparing the land for cultivation for the purpose of cooperating with the Government as contracted. Denies that at this time the private estate land passed to the ownership of speculators of large wealth or political influence, who proceeded to incorporate a company called the "Land & Water Co.", or that through the political influence of its officers the Government's duties of diligence or cost reclamation of entrymen's land or lands was left thereafter to be fulfilled as it pleased or profited the company to do so; or that on September 12, 1903, the second form withdrawal was changed to a first form withdrawal, or continued as such to enable the company to effect the sale of its own lands, or to prevent the settlers on government land to become strong enough to independently regain the land entered. Denies that the said company was loath to furnish water to settlers, or that the plaintiff at any time reclaimed or cultivated or improved the land according to his intentions after making entry or attempted entry. Denies that as a condition of its lawful or logical status under first form withdrawal all contest rights or privileges pertaining to the homestead law were cut off by the operation of the withdrawal without regulative action of the Land Department; or that mistaking the law, or ignoring the law or the obligations contracted, or equity considerations existing with entrymen, the Land Department attempted on June 6,
49 1905, to separately provide by regulations for the consideration of contest rights or privileges. Denies that it became known to the defendant through his friendly relations with certain Land Department Officials that the aforesaid conditions or any conditions, had forced entrymen to exhibit technical flaws in the matter of residence or cultivation of the lands entered, or that proceeding on the advise, or assurance of such certain officials, or any officials, defendant sought to take speculative advantage of the plight in which prior entrymen had been placed by contesting, under the provisions of the regulations aforesaid, a number of entries including that of the plaintiff, for the purpose of selling the preferred rights. Denies that at the hearing of said contest it was found, or conceded, or established without dispute that plaintiff had established, or made improvements as required by law on said land, or that any lack of cultivation or absence was due to conditions not in the control of the plaintiff, or that the plaintiff was at all times as required by law residing on, or reclaiming, or cultivating, or improving the land when served with contest notice. Denies that departmental officials wrongfully, or unlawfully, or without right, or by reason of prejudice, or bias, decided that abandonment was proved; but states that the said Land Department rightfully, and in accordance with the laws of Congress and the rules and regulations
50 of the Land Department, made in pursuance thereof, recognized the preferred right of this defendant to enter said lands. Denies that any prejudice was created in the Department

Officials against the plaintiff, or that after hearing, or before final appeal, the Department realized any inconsistancey or illegality of the regulations aforesaid, or made other regulations of January 19, 1909, which in any way deprived this defendant of his preference right theretofore earned. Denies that the Land Department on June 1, 1912 accepted homestead entry of the defendant on the stated grounds of the preference right derived from the regulations of June 6, 1905, solely because of the bias or prejudice aforesaid; but states that the Land Department accepted the entry of the defendant under the Act of Congress hereinbefore referred to, and the regulations of June 6, 1905, and other regulations made in pursuance of law.

XXIV.

Denies that there was any desire of the defendant, or any growing desire of the defendant to deprive plaintiff of any land to which he was justly entitled; or that there was any growing prejudice, or any prejudice on the part of the Land & Water Company against the plaintiff; or on the part of the Land Department officials, or that there was any conspiracy between or among any of said parties to cause decisions or actions of the Land Department to be adverse to the rights of the plaintiff regardless of the merits of the
51 case, or otherwise. Denies that Department of Justice officials were induced to join, or with anyone else attempted to injure, or oppress, or threaten, or intimidate plaintiff in the free exercise or enjoyment of the right or privilege, or any right or privilege secured to him by the Constitution of the United States or to deprive him of his residence upon, or cultivation of any land; or that the Department of Justice officials consented to loan the criminal processes of the Government to shield or protect defendant from civil suits then or thereafter brought against him by the plaintiff, or to hamper, or harass, or impede, or prevent plaintiff from protecting his right to the possession of the land, or his right to the title thereto, in any court proceedings. Denies that in pursuance of any conspiracy, or to effect or accomplish the object of any conspiracy, or by advice or counsel of Land Department officials, or with criminal proceedings planned, or already planned in anticipation of resistance by plaintiff, he, on November 25, 1912, or at any other time, forcibly entered upon, or attempted to take possession of the land herein described, or then improved, or reclaimed, or occupied or cultivated by plaintiff, or then in the lawful or peaceful possession of the plaintiff, or that defendant was removed by the peace officers of the State acting in their official capacity, without the connivance, or approval, or assistance of the plaintiff; or that the plaintiff was arrested in pursuance of
52 a wire of this defendant, or that a deputy United States Marshal was dispatched, or arrested the plaintiff, except for the plaintiff's own violation of the law, and for which after a fair and impartial trial he was duly and legally convicted. Denies that any assistant United States Attorney demanded as a condition of

plaintiff's release that defendant be permitted to take possession of the land then in possession of the plaintiff, of that any pending court proceedings be dismissed, or future court complaint not made. Denies that said assistant United States Attorney reported to the Land Department at Washington, where appeals of plaintiff to the land decisions were pending, that plaintiff had been arrested for driving defendant off the land by force or violence, or that plaintiff had been released on his promise to vacate the land forcibly held by him, or to dismiss all actions then pending in the local courts. Denies that subsequently a Land Department official representing to act in his official capacity, or alleging positive knowledge that the decisions then pending in the Land Department would deny the right of plaintiff, demanded with heat that plaintiff vacate and allow defendant to assume possession of the land. Denies that thereafter the United States District Attorney so intimidated the local court by letter that the Justice thereof made private or verbal statement to defendant rescinding the trial judgment aforesaid, or that thereupon defendant again forcibly assumed possession of
53 the land, or that when plaintiff was again arrested the assistant attorney stated to the Court that the proceedings were had according to the ideas of the Land Office. Denies that any wrongful methods were used in any prosecution against the plaintiff, or that any evidence was manufactured against him, or that any reports circulated through the "Los Angeles Times" concerning plaintiff in any way assisted or helped toward his conviction, or that his conviction was in any other manner than by lawful and proper and legal means, or that plaintiff became bankrupt by reason of any wrongful acts of the defendant or anyone else, or that he was unable to properly conduct his suit against the defendant by reason of any act of the defendant or anyone else. Denies that plaintiff was not able to defend himself in the ejectment case in the Superior Court of Riverside County, California, as set up in paragraph XXVII of his amended complaint, or that as a result of his inability he was ejected from said land; but defendant states the facts to be that plaintiff appeared in said action and was well represented therein by an able firm of attorneys. Denies that the defendant's alleged preference right, or preferred right, was obtained or entry made for the purpose of speculation, or not for a home. Denies that plaintiff's contest application was rejected on the ground that his charges were mere conclusions.
Denies that the Department officials in any way failed to
54 consider any lawful right of the plaintiff. Denies that in view of the contest notice served upon defendant, that he, defendant, solicited the Department, or the Department officials to cancel the entry of such other claimant, or restore defendant's status to such other land, or accept new scrip locations in the place of the entry plaintiff had applied to contest. Denies that the plaintiff, within thirty days from the filing of scrip locations, made protest in due form to said scrip locations, or that the Register of the Land Office stated to plaintiff that he would not approve of defendant's scrip applications in view of the known rights of

plaintiff, or his protest thereon; or that to prevent the Register from sustaining the protest of plaintiff, some other incumbent of the Land Office transmitted the scrip applications of defendant to the General Land Office in Washington, before the Register had opportunity to take action thereon, or destroyed the protest of plaintiff, or that thereafter the General Land Office approved said scrip application on the report of the chief of the Field Division that no protest had ever been made against said application, or that every effort of plaintiff to get a hearing on his protest was denied. Denies that plaintiff's appeal, or rights, or hearing was denied except for good and sufficient reason. Denies that in all the litigation before the Land Department between plaintiff and defendant no service was ever made upon plaintiff of any paper used or process taken by him or his attorney, or that no service was made
55 upon plaintiff except the aforesaid application; or that defendant at any time became a stranger to the past record of the land by reason of filing his relinquishment thereof, or that he was not entitled to be heard thereon, or that in all other cases the Land Department has permitted defendant or his attorneys to file briefs, or statements, or private or confidential letters to the individual examiners in charge of the cases, except as permitted by the rules and regulations of the Land Department, or that the Land Department has considered or allowed defendant's claim without service or evidence of service of any of the papers upon the plaintiff. Denies that the acts of the Land Department are contrary to the spirit or intention of the Constitution, or against the laws of the United States, or are violative of all or any principles of equity, or justice, or fair dealing, or against public policy, or were applied through bias or prejudice culminating in a conspiracy; or that the Department was seized with animosity against the plaintiff or any one else, or that the Department was incapable of rendering a just judgment; or that the Department has proceeded squarely, or at all, against law in refusing to consider the right of plaintiff to complete his claim under first form withdrawal to land entered or settled upon before such withdrawal; or that the department is entirely without authority to refuse to consider it; or that the Department has proceeded squarely against law
56 in attempting to legislate by regulation as to matters not concerning reclamation; or that it has extended to the defendant any privileges or benefits not obtainable by plaintiff, or has subjected plaintiff to penalties or exactions not required of defendant; or that the Department has proceeded against law or public policy in assuming authority to impair or abrogate existing contract obligations with plaintiff in order to assume future obligations to defendant, or otherwise. Denies that the land department has proceeded directly or at all against the rule established by a long line of decisions, or against its practice at the time, or at any time, in other identical cases. Denies that any criminal processes of the Government have been solicited, or secured, or used to deprive plaintiff of his constitutional right to remain on the land entered until patent issued, or until dispossessed by the judgment

of a competent court, or that the rights of plaintiff were in any way effected before the department by reason of any criminal proceeding, or that the department has given evidence of the most extreme, or any extreme prejudice, or partisan intent. Defendant denies that plaintiff was at any time, or is now, entitled to the patent to said land, or any part thereof, or that patent would have issued to plaintiff had it not been that he was injured by bias or prejudice. Defendant denies that he, the plaintiff, was in any way injured by bias or prejudice, or that he has at any time
57 shown himself entitled to make entry upon said lands, or any part thereof, or have patent issued to him.

By way of further defenses, the defendant states:

I.

That under and in pursuance of lawful and regular rules of the Land Department of the United States, the right of a successful contestant to make entry upon the lands described in plaintiff's complaint was given, and which entry, as aforesaid, could be made within thirty days of notice that the lands involved had been released from the withdrawal order and made subject to entry; and this defendant alleges that he in all respects complied with the Act of Congress of 1880 giving him a preference right to make entry upon said lands, and rules and regulations of the Department of the Interior relating thereto; and in a contest hearing between plaintiff and defendant over said lands before the Land Office at Los Angeles, California, having jurisdiction of the parties and of the subject matter, the contest was decided in favor of this defendant; and that the action of the said local Land Office was in due course of time affirmed by the Secretary of the Interior of the United States, this being the highest authority to which an appeal could be taken in such cases; and that said decision of the local Land Office was in all respects affirmed by the said highest authority, and the prefer-
58 ence right of this defendant to enter said land sustained, and that plaintiff's entry to said land was cancelled on or about April 19, 1909, and that the commissioner of the Land Office had sustained defendant's contest, and given defendant a preference right to enter said lands at a date prior to January 19, 1909; and while the regulation of the Land Department of June 6, 1905, giving this defendant the preference right in accordance with the Act of Congress of 1880 was still in force and effect, and in pursuance of defendant's said right, his entry on said lands was regularly made, and patent thereafter issued to him, and the plaintiff has no right, title, claim or interest thereto, or any deed to said lands.

II.

That heretofore, to-wit, on the 3rd day of June, 1912, the defendant instituted an ejectment action against this plaintiff in the Superior Court of Riverside County, California, the said land being

located in said Riverside County, California, and that the Court had jurisdiction of the plaintiff and defendant and of the subject matter, to-wit, the land mentioned in plaintiff's complaint herein; and that defendant made answer to plaintiff's complaint of ejectment, and was represented by attorney; and on a trial of said action, judgment resulted in favor of this defendant, who was plaintiff in said action, and against this plaintiff, who was defendant in said action, and said cause is No. 5280, and that there is attached herewith as
59 defendant's Exhibit- A, B, and C, the complaint, answer and the finding and judgment in said cause, and the same are hereby expressly made a part of the answer; and defendant states that in the said action the very matters here in controversy were in controversy and fully and finally adjudicated in that said judgment was and is a final judgment, and that no appeal has ever been taken therefrom.

III.

By way of further defense, the defendant states that heretofore to-wit, on or about the 25th day of March, 1916, the plaintiff herein instituted, in the Superior Court of Riverside County, California, against this defendant, an action of the same nature involving the same land and the same identical state of facts as in the case at bar, and which case in No. 7011, and in said case the plaintiff therein and the plaintiff herein sought the same relief as in the case at bar, and that said Court had jurisdiction of said cause, and of the subject matter and of the parties; and the defendant herein, who was the defendant therein, appeared in said cause by demurrer to plaintiff's amended complaint, and thereafter, the said demurrer of the defendant was sustained to plaintiff's complaint and judgment was entered on June 30, 1916, in favor of the defendant, and that the complaint did not state facts sufficient to constitute a cause of action, and the amended complaint was dismissed; and that by said judgment the very issues involved in the case at bar were
60 fully and finally adjudicated, and that the plaintiff therein and the plaintiff herein, took no appeal from said judgment, and the time for appeal has now long since elapsed, and said judgment has become final and has fully adjudicated the very issues involved in this cause; and that there is attached herewith and made a part of this answer as defendant's exhibits "D," "E," and "F," respectively, the complaint, answer, and findings and judgment in said cause.

Wherefore, this defendant prays that plaintiff take nothing by this action and that defendant be discharged with his casts.

DUKE STONE,
Attorney for Defendant."

The following facts are agreed to:

1. That on December 1, 1902, William B. Edwards made homestead entry No. 10106 for the N. E. ¼, Section 11, T. 7 S., R. 22 E. S. B. M.;

2. That on the 17th day of July, 1902, the Commissioner of the General Land Office, Washington, D. C., issued a letter as follows, to-wit:

"E.
A. W. B.
114,039-1902.

Department of the Interior,
General Land Office,
Washington, D. C., July 17, 1902.

Subject: Withdrawal and Suspension from Entry.

Register and Receiver,
U. S. Land Office,
Los Angeles, California.

SIR:

The Honorable Secretary of the Interior by a letter dated June 27, 1902, and his order endorsed thereon dated July 2, 1902,
61 has directed the temporary withdrawal from settlement or other disposition under the public land laws, until relieved from suspension, of certain townships, some of which lie within your district.

You are therefore directed to withdraw from disposal the following townships, so far as surveyed and on file:

Ts. 1 N.	Rs. 24 E. S. B. M.
" 1, 2, 3, 5 N.	" 25 " " " "
" 1, 2, 3, N.	" 26 " " " "
" 2 N.	" 27 " " " "
" 1 to 16 S. inclusive	" 22, 23, 24, E. S. B. M.
" 9 to 12 S.	" 21 E. " " "

Please acknowledge receipt.

BINGER HERMANN,
Commissioner."

3. On September 12, 1903, the commissioner of the General Land Office addressed to the Register and Receiver at Los Angeles, California, the following communication:

F.
152,187–1903.
D. B.

Department of the Interior,
General Land Office,
Washington, D. C., Sept. 12, 1903.

Subject: Withdrawal for Irrigation.

Register and Receiver,
Los Angeles, California.

SIRS:

Following my telegram of the 18th instant, withdrawing lands in your district for irrigation purposes by whole townships you are now advised that by departmental direction of the 8th instant,
62 you will temporarily withdraw the following lands surveyed and unsurveyed from all forms of disposal whatever, under the first form of withdrawal authorized by Sec. 3 of the act of June 17, 1902 (32 Stats. 338).

San Bernardino Base and Meridian.

T. 9 S. R. 21 E. Secs. 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 35 and 36.
T. 10 S. R. 21 E. Secs. 1, 2, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 35, 36.
T. 11 S. R. 21 E. Secs. 1, 12, 13, 24, 25, and 36.
T. 12 S. R. 21 E. Secs. 1, 12, and 13.
T. 7, S. R. 22 E. Secs. 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36.
Fractional T. 8 S. R. 22 E.
Fractional T. 10 S. R. 22 E.
Fractional T [illegible] S. R. 22 E.
Fractional T. 12 S. R. 22 E.
Fractional T. 13 S. R. 22 E.
Fractional T. 7 S. R. 23 E.
Fractional T. 8 S. R. 23 E.
Fractional T. 13 S. R. 23 E. Secs. 35 and 36. T. 14 S. R. 23 E. Secs. 13, 24, 25, and 36.
Fractional T. 9 N. R. 22 E. Secs. 1, 2, 3, 11, 12, 13 and 14.
Fractional T. 10 N. R. 22 E. Secs. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 34, 35 and 36.
T. 7, N. R. 23 E. Secs. 1, 2, and 12.
63 Fractional T. 8 N. R. 23 E. Secs. 3, 4, 5, 8, 9, 10, 11, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 27, 34, 35 and 36.
Fractional T. 9 N. R. 23 E. Secs. 6, 7, 18, 19, 20, 21, 27, 28, 29, 30, 32, 33, and 34.
T. 4 N. R. 24 E. Secs. 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, and 24.
T. 5 N. R. 24 E. Secs. 1, 12, and 13.
Fractional T. 6N. R. 24 E. Secs. 3, 4, 5, 8, 9, 10, 11, 14, 15, 16, 22, 23, 24, 25, 26, 27, 35, and 36.

T. 7 N. R. 24 E. Secs. 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 20, 21, 22, 23, 26, 27, 28, 29, 32, 33, 34, and 35.
Fractional T. 8N. R. 24 E.
Fractional T. 4 N. R. 25 E.
Fractional T. 5 N. R. 25 E.
Fractional T. 6 N. R. 25 E.
Fractional T. 3 N. R. 26 E. Secs. 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, and 26.
Fractional T. 4 N. R. 26 E.
Fractional T. 2 N. R. 27 E.
Fractional T. 3 N. R. 27 E.
Please acknowledge receipt hereof.

Very Respectfully,

W. A. RICHARDS,
Commissioner."

4. It is conceded and agreed that the homestead application of William B. Edwards dated December 1, 1902, was made under Section 2289 of the Revised Statutes of the United States, and under Act of June 17, 1902, for the land above described, said ap-
64 plication was in due form duly certified by A. J. Crookshank, Register, and was accompanied by the usual and regular non-mineral affidavit in due form duly verified, together with the usual homestead affidavit duly sworn to by said W. B. Edwards; and that on December 1, 1902, Receiver's receipt No. 10106 in due and regular form was issued to said William B. Edwards by Arthur W. Kinney, Receiver of the Los Angeles Land District, Los Angeles, California; and the there was printed upon said Receipt so issued the following note:

"4—137.

Receiver's Receipt No. 10106. *Application No.* 10106. *Homestead.*

(Stamped in red:) This entry allowed subject to the provisions of the Act of June 17, 1902 (Public No. 161).

Receiver's Office,
Los Angeles, Cal., Dec. 1, 1902, 190–.

Received of William B. Edwards the sum of Sixteen dollars — cents; being the amount of fee and compensation of Register and Receiver for the entry of N. E. ¼ of Section 11 in Township 7 South of Range 22 East S. B. M., under section No. 2289, Revised Statutes of the United States.

ARTHUR W. KINNEY,
Receiver.

65 $16.00.

(Stamped in red:) This entry allowed subject to the provisions of the Act of June 17, 1902 (Public No. 161).

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.

06—012

(Printed in Red.)

See note in red ink, which Registers and Receivers will read and explain thoroughly to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, but for no other purpose.

06 If, after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of said timber, and also to criminal prosecution under Section 2,461 of the Revised Statutes."

5. That on October 22, 1904, leave of absence for one year from Sept. 1st, 1904, was granted to William B. Edwards from his said homestead.

6. That on January 30, 1908, Patrick H. Bodkin, defendant herein, filed his affidavit of contest against the said entry of William B. Edwards, which affidavit of contest and contest notice are in the following words and figures, to-wit:

"4—072.

Affidavit to be Filed Before Contest.

Department of the Interior,
United States Land Office,
Los Angeles, California, January 29, 1908.

I, Patrick H. Bodkin, of the town of Los Angeles, county of Los Angeles, State of California, being duly sworn and upon oath
67 say: That I am well acquainted with the tract of land embraced in the homestead entry of William B. Edwards, No. 10106, made December 1, 1902, for the North East ¼ of Sec. 11, Tp. 7 South, Range 22 E.S.B., and know the present condition of the same; also that said William B. Edwards has abandoned the land for more than six months last past, that he never built a house on said land, or established residence thereon and made no permanent improvements on said land

*(and that said alleged absence from the said land was not due to his employment in the Army, Navy, or Marine Corps of the United States as a private soldier, officer, seaman or marine during the war with Spain, or during any other war in which the United States may be engaged); and this I am ready to prove at such time and place as may be named by the Register and Receiver for a hearing in said case; and I therefore ask to be allowed to prove said allegations, and that said homestead entry No. 10106 may be declared canceled and forfeited to the United States, I, the said contestant, paying the expenses of such hearing.

PATRICK H. BODKIN.

I hereby certify that the foregoing affidavit was read to the affiant by me; (or has been satisfactorily identified to me by Chas. A. Shaw), and that said affidavit was subscribed and sworn to
68 before me at amy office at Los Angeles, Cal., in the county of L. A., State of Cal., this 30 day of Jany., 1908, within my jurisdiction. 4.05 p. m.

FRANK C. PRESCOTT,
Register.

*NOTE.—To be stricken out, except in homestead cases where entry is contested on charge of abandonment.

(over).

6-829.

No. 1.

Also appeared, at the same time and place, James M. Ocheltree, residing at Yuma P. O. but residing in Imperial Co. Cal., county of ——, State of —— and ——, residing at ——, county of ——,

State of ——, who being duly sworn, depose and say: That they are acquainted with the tract described in the above affidavit of Patrick H. Bodkin, and know from personal knowledge and observation that the statements therein made are true.

JAMES M. OCHELTREE.

I hereby certify that the foregoing affidavit was read to the affiants by me; (or have been satisfactorily identified to me by P. H. Bodkin), and that the said affidavit was subscribed and sworn to by me at my office at Los Angeles, county of L. A., State of Cal., this 30 day of Jany., 1908, within may jurisdiction.

FRANK C. PRESCOTT.

69 (Endorsed:) 362. 4—072. Land Office at Los Angeles, California. Contest Affidavit in Homestead Case.—Patrick H. Bodkin against William B. Edwards.—Filed Jany. 30, 1908. Notice issued Jany. 30, 1908. Set for hearing April 3, 1908. Before Reg. & Rec. Los Angeles, California.—Note.—All of the above brief must be filled by Register or Receiver. 6-829."

"Original.

4—345.

Contest Notice.

Department of the Interior,
United States Land Office,
Los Angeles, Cal., April 3, 1908.

A sufficient contest affidavit having been filed in this office by Patrick H. Bodkin, contestant, against — entry No. 10103, made December 1st, 1902, for North East Quarter of Section 11, Township 7 South, Range 22 E, S. B. M., by William B. Edwards, Contestee, in which it is alleged that said William B. Edwards has abandoned the land for more than six months last past, that he never built a house on said land, or established residence thereon and made no permanent improvements on said land and that said alleged absence from the said land was not due to his employment in the Army, Navy or Marine Corps of the United States in any capacity in time of war, said parties are hereby notified to appear, respond and
70 offer evidence touching said allegation at 10 o'clock a. m. on June 17th, 1918, before —— ——, *the Register and Receiver at the United States Land Office in Los Angeles, Cal.

The said contestant having, in a proper affidavit, filed —— —, 190—, set forth facts which show that after due diligence personal

71 *If the testimony is to be taken before the Register and Receiver, and not under Rule 35, the words in () parenthesis should be erased.

service of this notice can not be made, it is hereby ordered and directed that such notice be given by due and proper publication. ¢.

——— ———,
Register.
O. R. W. ROBINSON,
Receiver.

Proof of Personal Service.

STATE OF CAL.,
County of Los Angeles, ss:

——— ———, being first duly sworn, on his oath says that he served the within notice by delivering a true copy thereof to each of the within-named contestees at the following-named times and places, to-wit; I served notice on Wm. B. Edwards May 4th 1908 9 a. m. Neighbours, Riverside Co., Cal.

(Sign.) PATRICK H. BODKIN.

Subscribed and sworn to before me this 16 day of June, 1908.
O. R. W. ROBINSON,
Receiver.

——— ———,
County of ———, *ss:*

——— ———, being first duly sworn, on his oath says that he served the within notice by delivering a true copy thereof to each of the within-named contestees at the following-named times and places, to-wit:

I served formal notice of Contest personally on Wm. B. Edwards while he was on the land above mentioned N. E. ¼ of Sec 11, May 4th, 1908. I also had written him one month before, the receipt of which he acknowledged, so that he was fully aware of the contest before he went back on the land to make present improvements.

(Sign.) PATRICK H. BODKIN.

Subscribed and sworn to before me this — day of ———, 190–.

——— ———,
——— ———.

72 (Endorsed;) (In blue pencil:) Edwards return this. Docket No. —. Patrick H. Bodkin vs. William B. Edwards. Notice of contest. Issued April 3, 1908. Served May 4, 1908. Filed in U. S. Land Office, Los Angeles, Cal., Jun. 16, 1908. *190.* Frank C. Prescott, Register."

¢If personal service can be obtained the Register should erase the last paragraph before signing this notice.

7. That hearing was had upon said contest on the 17th of June, 1908, and on December 31, 1908, the Register and Receiver rendered their decision in the following language, to-wit:

"PATRICK H. BODKIN

vs.

WILLIAM B. EDWARDS.

Opinion of Register and Receiver.

December 1, 1902, William B. Edwards, made H. E. 10106 for the N. E. ¼, Sec. 11, T. 7 S., R. 22 E., S. B. M.

On proper showing, leave of absence was granted claimant for one year, from September 1, 1904.

January 30, 1908, Patrick H. Bodkin, filed, in this office, an affidavit of contest against said entry alleging that—

'William B. Edwards has abandoned the land for more than six months last past, that he never built a house on said land, or established residence thereon and made no permanent improvements on said land.'

Original notice of the above contest affidavit issued from this office January 30, 1908, April 3, 1908, contestant subscribed to
73 an affidavit before this office showing failure on his part to locate contestee and serve notice in person, and on which a new notice was issued and hearing set for 10.00 a. m. June 17, 1908.

Said last referred to notice, according to affidavit No. 1, of contestant, made June 16, 1908, was served on contestee May 4, 1908.

Contestant endorsed the following statement on the original notice:

'I served formal notice of contest personally on Wm. B. Edwards, while he was on the land above mentioned, N. E. ¼, Sec. 11, May 4, 1908. I also had written him one month before, the receipt of which he acknowledged, so that he was fully aware of the contest before he went back on the land to make present improvements.'

Hearing was had June 17, 1908, at which time contestant was present in person and represented by counsel; contestee was present but not represented, except by the efforts of the Receiver, who was present during the hearing.

The testimony of the witnesses, including contestee shows beyond question that allegations of contestant, were true, as to conditions then existing.

The testimony shows that at the date on which contest affidavit was made, no improvements of any kind were on the premises, that
74 contestee was absent and had been for a period in excess of six months, and that he had never cultivated any part of the land.

Contestee, according to his own testimony, went on this land shortly after date of entry, and commenced building a house, put down a well and erected a corral. He claims to have been kicked by one of his horses before the house was entirely completed, and that in order to obtain proper attention he left the claim about March 1, 1903, going to Imperial, Cal.—that after recovery from the injury sustained, he was without funds and went to work for Edgar Bros., grading contractors, at Imperial, Cal. and worked for them from March 8th to May 15th, 1903, when he leased some land in Imperial Valley from one Martin, and lived on and worked same until the following January; that from about January 1904, until in 1907, subsequent to date of contest affidavit, he lived on and worked other land in Imperial Valley, and only returned to the land in question at intervals, which he would not swear were not longer than six months. He claims to have been away from the land, for the reason that he could not make a living on same, owing to lack of water for irrigation purposes, and has offered testimony to that effect, though it is also shown that others in the same community managed to get along under similar circumstances.

He returned to the land in April, 1907, when he claims to have first received information of the contest in question, after
75 which time he attempted to have contestant dismiss same, and on his failure to do so, commenced the first active work of improving the land, other than that heretofore referred to, and some little effort which he claims to have expended on the occasion of a visit in September, 1904.

The testimony shows that subsequent to the visit last referred to, and prior to 1905, the improvements placed on the land were destroyed by unknown parties. Since contestee's return to the entry in April, 1907, he has made arrangements for and secured water for irrigating purposes, and at the date of the hearing had about five acres planted to corn, and 65 to 70 acres cleared, leveled, ditched and ready for crop; also had made about 4,500 'dobies' and had a foundation for a new home started.

On this residence and these improvements, contestee claims, in view of the conditions due to his inability to secure water for irrigating purposes and to the necessity for living elsewhere, in order to make a living, that his entry should be allowed to remain intact, subject to future compliance with the homestead law.

In the opinion of this office, such a course could not properly be pursued in view of all the circumstances shown.

Contestee admits that in 1907, prior to his return to the land, he registered and voted, at Imperial, then in San Diego County, and would not say that he had not voted prior to this time.

76 There clearly had been an abandonment of the land by contestee, and there has been an utter lack of good faith shown in his relations towards his entry. His improvements placed on the land subsequent to the date of the contest affidavit, were clearly made with knowledge of the contest and in view of same the

entry should be canceled and contestant should be awarded such preference right of entry as is provided.

It is so recommended.

FRANK C. PRESCOTT,
Register.
O. R. W. ROBINSON,
Receiver."

8. That said W. B. Edwards appealed in due time and form from said decision to the Commissioner of the General Land-Office, Washington, D. C. and on June 25, 1909 the Commissioner's decision was rendered in the following language:

" 'H.'
W. H. W.

Address only the Commissioner of the General Land Office.

Department of the Interior.
General Land Office,
Washington, D. C., June 25, 1919.

PATRICK H. BODKIN

vs.

WILLIAM B. EDWARDS.

H. E. No. 10106.

Cancellation Affirmed.

Register and Receiver,
Los Angeles, California.

SIRS:

By letter of March 27, 1909, you transmitted the record in
77 the above-entitled case, including defendant's appeal from your decision recommending the cancellation of his entry.

December 1, 1902, William B. Edwards made H. E. No. 10106, for the N. E. ¼, Sec. 11, T. 7 S., R. 22 E.

January 30, 1908, Patrick H. Bodkin filed his affidavit of contest against said entry, charging that:

William B. Edwards has abandoned the land for more than six months last past; that he never built a house on said land, or established residence thereon and made no permanent improvements on said land, and that defendant's absence from the land was not due to military or naval service, &c.

Defendant was personally served with alias notice of contest, May 4, 1908.

At the hearing before you, September 17, 1908, the parties appeared and submitted testimony.

From the evidence adduced you found that it had been clearly established that defendant had abandoned the land; that there had been an utter lack of good faith on the part of the entryman; that the improvements placed on the land subsequent to date of contest, were made with full knowledge of the contest and induced thereby.

You therefore recommended that the entry be canceled.

78 Original contest notice issued in this case, January 30, 1908, and on April 3, 1908, contestant made affidavit, showing failure to locate contestee, at which time an alias notice was issued and served on defendant, while on the land in dispute.

Defendant had knowledge of the pending contest against his entry, prior to the time he returned to the claim, as plaintiff had mailed him a letter on March 26, 1908, informing him of the contest, and requesting him to sign and return a relinquishment inclosed with the letter. In answer to this letter, defendant went to the office of plaintiff and talked the matter over with him.

The testimony of the witnesses, including that of the defendant, conclusively established the truth of the charges made in the affidavit of contest.

The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land.

Defendant testified that he went on his claim shortly after he made entry and commenced building a home, put down a well and erected a corral; that he was kicked by a vicious horse sometime before the house was completed, and that in order to obtain proper attention, he left the claim about March 1, 1903, going to

79 Imperial, California, and that after recovering from the injury he was without funds and went to work for a firm of grading contractors at Imperial and worked for them from March 8 to May 15, 1903, when he leased some land in the Imperial Valley and lived on and worked the same until the following January; that from about January 1904, until in 1908, and subsequent to the date of the contest in this case, he lived on and worked other land in Imperial Valley and only returned to his claim at intervals of about six months each. He testified that these visits were all of short duration and were generally made in March and September of each year, and he would not positively swear that he was not away from his claim more than six months at any one time. Defendant's excuse for being away from the land is that he could not make a living on the same, owing to lack of water for irrigation purposes. He offered testimony to this effect, though it is shown that others in the same community managed to get along under similar conditions and circumstances.

Defendant returned to his claim about the first of April, 1908, and after failing to get the contest dismissed, commenced the first active work of improving the land, other than that heretofore referred to.

The testimony shows that long before the visit last referred to, and prior to 1905, the improvements placed on the land were

80 destroyed by unknown parties. Since defendant's return to the land in April, 1908, he has made arrangements for and

secured water for irrigating purposes, and at the date of the hearing had about five acres planted to corn and sixty-five to seventy acres cleared, leveled, ditched and ready for crop. He also had the foundation of a house started.

From alleged residence, and these improvements, defendant claims, that in view of the conditions due to his inability to secure water for irrigating purposes and to the necessity of living elsewhere in order to make a living, that his entry should be allowed to remain intact, subject to future compliance with the homestead law.

Defendant admits that in 1907, prior to his return to the land, he registered and voted at the town of Imperial, and he would not say that he did not vote at other times prior thereto.

The facts in this case clearly show that defendant has never established a bona fide residence on the land covered by his entry. His father and mother resided at Imperial, California, about one hundred miles from this claim, and defendant admits that his home and residence has at all times been at that point, and that he has been engaged in business there, from a date since soon after making his entry up to the time that he had knowledge of the pending contest against his entry, and then came to the land. Defendant claims that he is now prepared to meet the requirements of
81 the homestead law, and that he should be excused for his defaults from 1902 to 1908, for the reason that the Government promised the homestead entrymen in the locality of this land that settlers would be furnished with water to irrigate their claims. He admits that he saw the Government circular relative to these Government projects, and if he did, he must have been then and there advised that he must meet all the requirements of the homestead law, and that he could not depend upon water being brought to the land by the Government and use that as an excuse for failure to meet the requirements.

In the instructions of the Department as to the arid lands, it was distinctly stated that no modification of the homestead law in its application to said lands could be made, as the Secretary of the Interior had no authority to extend the time for the establishment of residence, or to change any of the conditions of the homestead law as to the maintenance of such residence and cultivation of the land. See 32 L. D., 633.

Your decision being clearly right the same is affirmed.

Defendant's entry is held for cancellation, subject to the right of appeal.

82 So note upon your records, notify the parties hereof, and the defendant of his right of appeal to the Department.

Respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

BOARD OF LAW REVIEW,
By JOHN McPHAUL."
M. G. O.

9. That in due time and form said William B. Edwards appealed from the decision of the Commissioner of the General Land-office to the Secretary of the Interior and on January 6, 1910 the Secretary's decision was rendered in the following language, to wit:

F. W. C.
E-1979.

Address only the Secretary of the Interior.

"Department of the Interior,
Washington, Jan. 6, 1910.

PATRICK H. BODKIN

v.

WILLIAM B. EDWARDS.

Appeal. Affirmed.

Los Angeles 02472. "H."

(Stamp:) Received Jan. 8, 1910, G. L. O.

The Commissioner
of the General Land Office.

SIR:

William B. Edwards has appealed from your office decision of June 25, 1909, which affirms the action of the local office
83 holding for cancellation his homestead entry No. 10105, made December 1, 1902, for the N. E. ¼ Sec. 11 T. 7 S., R. 22 E., Los Angeles, California.

Said actions resulted from a contest filed January 30, 1908, by Patrick H. Bodkin, alleging that the entryman had abandoned the land for more than six months; that he never built a house on said land, or established residence thereon, and made no improvements on said land.

A hearing was had before the register and receiver September 17, 1908, both parties being present and both submitting testimony.

The record in the case has been reviewed. The testimony is correctly and quite fully set forth by your office.

The entryman appears to have prepared his own appeal, and has submitted an argument in support of it. He is evidently a man of considerable education. He also testified at considerable length. His testimony is quite frank, and bears the stamp of truth.

From his own testimony, it clearly appears that he failed to comply with the law in the matter of residence. Indeed, his actual home was in another county, where he qualified as a voter by swearing that he resided there. He states that he visited the land

about every six months, staying only a few days at a time. He had no house to live in. In fact, he had no house completed at date of hearing, more than six years after entry.

84 He evidently did considerable work on the land, in cultivating, digging brush, etc.; but this work was after he had personal knowledge that the contest had been filed. He seems to think it a great wrong and injustice that another may reap the benefit of his labors. The Department, under the plain facts in the case, especially the facts as shown from claimant's own frank testimony, is powerless to give relief.

The action appealed from is affirmed, and the papers in the case are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary."

Enclosures

10. Plaintiff then introduced in evidence the decision of the assistant Commissioner of the General Land Office dated April 19, 1910. The document referred to was in the following words and figures:

"1 inc. McD.
In reply please refer to Los Angeles 02472.
'H.'
J. L. M.

4-400.

Department of the Interior,
General Land Office,
Washington, D. C., April 19, 1910.

P. H. BODKIN

v.

WM. B. EDWARDS.

H. E. No. 10106, for N. E. ¼ Sec. 11, T. 7 S., R. 22 E.

Register and Receiver,
United States Land Office,
Los Angeles, California.

SIRS:

In reference to the above-entitled case, I inclose herewith a copy of the decision of the Secretary of the Interior, dated April
85 12, 1910, denying the motion for review of departmental decision dated Jan'y 7, 1910, which was adverse to Edwards.

Said case is accordingly hereby closed. Notify the parties in interest.

The entry has this day been canceled.

So note on your records and allow Bodkin thirty days to apply for the land.

Respectfully,

S. V. PROUDFIT,
Assistant Commissioner."

6—1614.

11. That thereafter, to-wit: on February 16, 1909 said Edwards filed notice of intention to make final five year proof to establish his claim to the land described in said entry; that said notice of intention to make proof was received and filed by the Register on the 16th day of February, 1909, and thereafter, to-wit: under date of February 18, 1909 notice for publication of said entryman's intention to make final five year proof was issued by the Register and was thereafter posted and published as required by statute, and proof thereof duly made and filed.

12. That on April 23, 1909, pursuant to said notice of [said Edwards filed in due form the usual non-mineral affidavit and][*] intention to make proof said Edwards filed in due form the usual non-mineral affidavit and produced before the Register and Receiver at the Los Angeles Land Office, Los Angeles, California, two of
86 the witnesses named in his said notice who together with the entryman, plaintiff herein, testified as follows, to-wit:

"*Homestead Proof—Testimony of Witness.*

ALL H. GILSON, being called as witness in support of the Homestead entry of William B. Edwards for N. E. ¼ Sec. 11, 17 S. R. 22 E. V. B. M, testifies as follows:

Ques. 1. What is your name, age, and postoffice address.

Ans. All H. Gilson, 48 years, Blythe, Cal.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. I am with both.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No. No.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans. Desert farming land covered with mesquite.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. Jan. 1, 1903.

[*Words enclosed in brackets erased in copy.]

Ques. 6. Have claimant and family resided continuously
87 on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Unmarried. No. He has been away once on account of injury & other times to work for a living.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. He lived on this land 4 to 5 weeks 2 or 3 times a year. Had a leave of absence one year. He has lived there continuously since April 1908.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About 90 acres—2 years. Planted crops 3 years.

Ques 9. What improvements are on the land, and what is their value?

Ans. House, adobe; 16 x 32 ft.—corral, well, clearing 100 acres. Value—$2,600 to 2,800.

Ques. 10. Are there any indications of coal, salines, of minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

88 Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. I do.

(Sign plainly with Christian name.)

(Signed) ALL H. GILSON

"Homestead Proof—Testimony of Witness.

GEORGE MCFEE, being called as witness in support of the Homestead entry of William B. Edwards for N. E. ¼ Sec. 11, T. 7 S. R. 22 E. S. B. M., testifies as follows:

Ques. 1. What is your name, age, and postoffice address?

Ans. George McFee, 55 years; Neighbors, Cal.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. I am with both.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No. No.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing farming, coal, or mineral land.

Ans. Desert farming land.

89 Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. Jan. 1903.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Unmarried. No. He has been away working for a living.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon the cultivated the land during such absence?

Ans. In April 1903 he was hurt and went away for medical assistance. Returned in fall of 1903, stayed a month or two. Went away to work. Returned in the winter & spring. Returned every few months. During last two years has resided there continuously.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. 90 acres—two seasons.

Ques. 9. What improvements are on the land, what is their value?

Ans. House; adobe; 16 x 32 ft. good house. Well & Corral—100 acres cleared. Value $2,600—$2,800.

90 Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. I think so.

(Sign plainly with full Christian name.)

GEORGE McFEE."

"Homestead Proof—Testimony of Claimant.

WILLIAM B. EDWARDS, being called as a witness in his own behalf in support of homestead entry, No. 10106, for N. E. ¼ Sec. 11, T. 7 S. R. 22 E. S. B. M., testifies as follows:

Ques. 1. What is your name, age, and postoffice address?

Ans. William B. Edwards; 47 years; Blythe, Cal.

Ques 2. Are you a native-born citizen of the United States, and if so, in what State or Territory were you born?

Ans. I am. Illinois.

91 Ques. 3. Are you the identical person who made homestead entry, No. 10106, at the Los Angeles, Cal. land office on the

1st day of Dec. 1902, and what is the true description of the land now claimed by you?

Ans. I am. N. E. ¼, Sec. 11, T. 7 S., R. 22 E. S. B. M.

Ques. 4. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. Began building house in Jan. 1903. Adobe & lumber 12 x 14 ft. Built another house May 1908, 16 x 32. Corral. Well. Pump. 80 acres cultivated. 10 acres more cleared. Value $2,500.00.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Unmarried. No. Have been away a good deal working for a living.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. I went on land in Jan. 1903. I was injured three months later & left, returning in Aug. 1903. Stayed a few weeks
92 and sent away again to work. Returned in Mar. 1904, stayed several weeks. Returned again in Aug. 1904. My absences since average about the same. Returned again in Sept. 1905. I had a year's leave of absence.

Ques. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. Have 80 acres in cultivation. 2 seasons.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. No. No.

Ques. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. Desert farming land.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11. Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 12. Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

93 Ans. No.

Ques. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. No.

Ques. 14. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral) made by you since August 30, 1890.

Ans. D. L. Entry in Los Angeles land office in 1903—I abandoned it & do not remember its description.

(Sign plainly with full christian name.)

(Signed) WILLIAM B. EDWARDS."

(Further printing.)

13. That on April 23, 1909, William B. Edwards paid the customary and usual fees for taking and transcribing the aforesaid proposed final proof, and made and filed the final affidavit required of homestead claimants in due form.

14. Plaintiff then introduced page 78 of the Homestead Contest Docket of the Los Angeles Land Office which is as follows:

"Homestead Contest Docket, P. 78.

362.
10106, H. E. Dec. 1/02 N. E. ¼.
117,522E.
12472.
14839.

PATRICK H. BODKIN, Los Angeles,

vs.

WILLIAM B. EDWARDS, Neighbors, Cal.

94

Jany.	30/08.	Aff. of Contest filed. Notices issued. Hearing Apr. 3/08.
Apr.	3/08.	Aff. for new notice filed; Notices issued. Hearing June 17/08.
June	6/08.	Subpœnas issues for J. E. Neighbors, C. C. Longworth, Mary Meyer, T. N. Chapman, Joseph De Frain, Mrs. Joseph De Frain and C. A. Hollister on behalf of contestant.
Jan.	17/08.	Authority of Andrew G. Park; Atty. for contestant filed Trial had; all parties present closed 4 P. M., June 18/08.
Dec.	31/08.	Decision of R. & R. in favor Contestant & recommending the awarding of a pref. right of entry.
Jan.	2, 1909.	Contestee not by Reg. mail at Neighbors, Cal. of decision of R. & R. Personal service *service* accepted Jany. 9/09.
Jan.	8, 1909.	Service of decision accepted by contestant.
Jan.	9, 1909.	Service of decision accepted by contestee.

Jan. 22, 1909. Appeal of contestee filed, but returned to him at Neighbors for evidence of service of copy on contestant.
Feb. 5, 1909. Appeal of contestee filed.
Feb. 13, 1909. Brief of contestee on appeal filed, retd. for correction.

95

Mar. 10, 1909. Brief of contestee on appeal filed.
Mar. 27, 1909. Papers to G. L. O.
H. June 25/09. Affirms decision of R. & R. holds entry for cancellation.
Sept. 27, 1909. Appeal to Secy. filed and returned for correction.
Oct. 21, 1909. Appeal to Secy. filed corrected.
H. Oct. 18/09. Calls for report.
H. Jan. 13/10. Encloses Depl. dec. of Jan. 6, '10, affirming dec. of Hon. Commissioner. Letter received from W. B. Edwards dated Mar. 15/10, notifying this office that he had that day sent a motion for review to the G. L. O. & served a copy on P. H. Bodkin.
H. April 19/10. Encloses copy of Depl. dec. April 12/10 denying motion for review; Entry cancelled. Bodkin allowed 30 days to apply for land. Case closed."

15. On September 3rd, 1914, Edwards filed with the Register and Receiver at Los Angeles, California, a motion to consider his final proof which had been offered on the 23rd day of April, 1909. Said motion was as follows:

96 Received Sep. 3, 1914, U. S. Land Office, Los Angeles, Cal.

"Before the Register & Receiver, Los Angeles Land Office.

02472.
"H."

Ex Parte WILLIAM B. EDWARDS.

Motion to Consider Proof.

William B. Edwards hereby moves that his final proof made April 23, 1909, (Serial number 02472) consequent to entry made Dec. 1, 1902, (H. E. No. 10106) be now considered. (N. E. ¼ Sec. 11, T. 7 S. R., 22 E. B. M.

That consideration of this proof has heretofore been erroneously subordinated to consideration of the alleged prior and superior right of one Patrick H. Bodkin, a right claimed to have been initiated while the land was subject to a first form withdrawal and therefore

while not subject to the initiation of any right, or that the entry on which proof was based was subsequently cancelled in furtherance of such supposed right of *b*odkin, is not now an issue in this case, *b*odkin having relinquished his entry based on such supposed right March 9, 1914, and as this case thereby became ex parte, no excuse now exists, as no reason formerly existed while the final proof of Edwards—made under the hardship and handicap of the withdrawal, and of contest wrongly and resultantly allowed with
97 the withdrawal, should not be considered, as the Department is not obligated to consult the future wishes, or consider the prospective future rights of a new claimant, before considering the existing claim of a prior entryman.

Respectfully submitted,

WILLIAM B. EDWARDS."

(Endorsed:) William B. Edwards, ex Parte. Motion to consider proof. Serial No. 02472, H. E. No. 10106 for N. E. ¼ Sec. 11, T. 7 S., R. 22 E., S. B. M.

16. Upon this motion the Commissioner on the 30th of March, 1915, rendered the following decision:

"In Reply Please Refer to Los Angeles 02472.

"F. S." S. H. C.
1 x C. F. D.
1 x R. & R.
J. T. N.

Address only the Commissioner of the General Land Office.

E10.

Department of the Interior,
General Land Office,
Washington, March 30, 1915.

Motion to Consider Proof Denied.

Register and Receiver,
Los Angeles, California.

SIRS:

December 1, 1902, William B. Edwards made Homestead Entry 02472 for the N. E. ¼ of Sec. 11, T. 7 S., R. 22 E., and on
98 January 30, 1908, Patrick H. Bodkin filed a contest, pursuant to which the entry of Edwards was canceled April 19, 1910, and the contest case of Bodkin vs. Edwards was closed.

April 23, 1909, prior to said cancellation, Edwards offered final five-year proof in support of his said entry.

May 18, 1910, William B. Edwards filed application to make a

second homestead entry for the said N. E. ¼ under serial number 013583, alleging residence on the tract since April 18, 1910. Said application was suspended, pending decision as to the character of the land.

The said land was withdrawn under the first form of withdrawal September 8, 1903, and was restored to settlement April 18, 1910, and to entry May 18, 1910.

May 18, 1910, Patrick H. Bodkin filed his homestead application for the said N. E. ¼ of Sec. 11 under serial number 010652, in the exercise of the preference right acquired under his successful contest against Edwards. Said entry was allowed on June 1, 1912, and on June 3, 1912, the application of Edwards was rejected for conflict therewith. Edwards appealed, but the said action was affirmed May 27, 1913. A motion for re-hearing was denied August 21, 1913, and petition for the exercise of supervisory authority was denied October 2, 1913. September 11, 1913, Edwards filed his application to contest the homestead entry of Bodkin, charging that the lat-
99 ter never legally established a residence upon nor cultivated the land, and that his entry was made for speculative purposes. Said application was rejected by your office upon the ground that the allegations were res judicata, and that they were insufficient to warrant a hearing. Said decision was affirmed by this office October 31, 1913, and on appeal said decision was affirmed by the Secretary of the Interior March 30, 1914, and the case closed under amended Rule 83, of Practice, reference being had to 40 L. D., 175. April 1, 1914, Edwards filed a petition for the exercise of supervisory authority, a motion for reinstatement of his canceled homestead entry, and a protest against three soldier's additional application of Bodkin,—022869, for the N. E. ¼ N. E. ¼ of said Sec. 11, 022871, for the W. ½ N. E. ¼ of said Sec. 11, filed March 6, 1914, upon which latter date Bodkin relinquished his said homestead entry, 010652. Said motions were considered by the Secretary on April 20, 1914, the Secretary stateing, with reference to the Bodkin relinquishment.

"* * * no rights accrued to Edwards by virtue thereof, his contest affidavit then pending on appeal being insufficient in substance. His rights under his original entry for said lands ended upon cancellation of the entry under Bodkin's contest. The petition is denied."

100 The contest case of Edwards vs. Bodkin was closed May 16, 1914.

September 23, 1914, final certificate issued in the case of Soldier's Additional Homestead Entry 022869, by Patrick Henry Bodkin, assignee, involving the right of Peter Dieckman for the N. E. ¼ N. E. ¼ of said Sec. 11.

September 23, 1914, final certificate issued in the case of Soldier's Additional Homestead Entry 022870, by Patrick H. Bodkin, assignee of Benjamin F. Howland, for the S. E. ¼ N. E. ¼ of said Sec. 11.

By office letter of December 23, 1914, application for Soldier's Additional Homestead Entry 022871, by Patrick H. Bodkin, assignee of the Estate of Gilford M. Dunn, for the W. ½ N. E. ¼ of said Sec. 11 was allowed, and the decision of the Secretary of October 31, 1914, was promulgated, and the protest of W. B. Edwards was dismissed. In said office letter of December 23, 1914, it was stated,

"It appears from the foregoing that the right of Edwards to the N. E. ¼ of said Sec. 11 has been twice adversely determined by the Department. His request for suspension of action and for remanding the alleged protest to your office is, therefore, denied, and it is held that Edwards has no right of appeal from this action. You will, however, notify Edwards that final action will be deferred for twenty days from service of notice hereof to enable him to
101 apply to the Secretary of the Interior for an order certifying the record under Rules 78 and 79 of the Rules of Practice."

By your letter of September 12, 1914, you transmitted a motion filed September 3, 1914, in your office by W. B. Edwards, to consider his final five-year proof submitted April 23, 1909, in support of his Homestead Entry 02472, which, as hereinbefore stated, was canceled April 19, 1910, persuant to the contest filed January 30, 1908, by Patrick H. Bodkin. This case has been the subject of careful consideration before this office, and Edwards has energetically endeavored to defeat the Bodkin contest and filings. The entire proceedings have been passed upon by the Department, as above stated. It appears, therefore, that the entryman has no standing in court, and in consequence his motion to consider final proof submitted September 23, 1909, in support of his entry, now canceled of record, cannot be entertained. The motion is accordingly denied; and, in view of the record in this case and of previous actions taken by the Secretary wherein it has been held that (see decision of the Secretary April 20, 1914).

"* * * his rights under his original entry for said lands ended upon cancellation of the entry under Bodkin's contest."

102 said motion to submit proof is denied without right of appeal, and the case is hereby closed.

Very respectfully,

D. K. PARROTT,
Acting Assistant Commissioner."

D. A. MILLRICK.

3-22-D. M. D.

17. On April 6th, 1915, the Secretary of the Interior rendered a decision in the words and figures as follows, to-wit:

D-26244.
"H."

"Department of the Interior

Washington.

WILLIAM B. EDWARDS

v.

PATRICK H. BODKIN.

Los Angeles 010,652.

Denial of Application to Contest. Petition Denied.

Petition for the Exercise of Supervisory Authority.

April 6, 1915.

March 30, 1915, the Department affirmed the action of the Commissioner of the General Land Office, rejecting the application of William B. Edwards to contest the homestead entry of Patrick H. Bodkin, for the N. E. ¼, Sec. 11, T. 7 S., R. 22 E., Los Angeles, California, land district.

A motion for rehearing was filed by Edwards, which was the subject of departmental decision of May 28, 1914, whereby the motion was denied.

103 A petition has now been filed by Edwards, requesting the exercise of the supervisory authority of the Department and for reconsideration of the case.

The application to contest was denied for the reason that the charges were not sufficient upon which to order a hearing. The contest was denied and the case closed.

In his present petition, the case is reargued with reference to the rights of Edwards under a former entry for this land, and the rights of Bodkin under his suspended preference right awarded for successful contest of Edward's entry. The time Edward's entry was canceled the land was within a reclamation withdrawal and Bodkin's preference right suspended. After the land was released from the withdrawal Bodkin exercised his preference right and made entry, and the contest here in question was then attempted by Edwards.

The petition states that Bodkin filed relinquishment of his entry March 9, 1915, and that Edwards should now be accorded preference right of entry by virtue of his application to contest, and also his application to make second entry.

As stated above, however, the contest was held insufficient and was, therefore, denied and the case closed. Any application to make second entry filed by Edwards while the land was embraced in the entry of Bodkin could not be made the basis of claim for preference right by Edwards.

104 No reason is seen for disturbing the action heretofore taken. Therefore, the petition is denied.
(Signed) ANDRIEUS A. JONES,
First Assistant Secretary."

18. Plaintiff then introduced in evidence the portion of the Register of Homestead entries kept in the local Land-office relating to the homestead entry of William B. Edwards, which entries were and are as follows:

Mr. Willis: I will just read this. It is just one small entry. The rest I have in a copy form. It reads as follows: "Number of application 02472 and 1016. Date of application, December 1, 1902. Tract entered, Northeast quarter, Section 11, Township 7 South, Range 22 East, 160 acres. Name of applicant: William B. Edwards. Residence, Ehrenberg, A. T. Fees, $10. Commissions, $6." Under "remarks" "Act June 17, 1902." "Kind: Hd. (1016) Receipt No. 16,288. Serial No. 02,472. Name, William B. Edwards. Address, Neighbours, Cal. Description of Land, Section N. E. ¼ 11, Township 7 S., Range 22 E., Area 160.

Date.	Notations.
1908.	
Nov. 30.	Entered in accordance with "M" Nov. 7/08, a/c contest by Patrick H. Bodkin.
105	
1909	
Feb. 16.	Notice of final proof filed.
" 19.	Notice of final proof issued R. and R. 4/23/09.
Apr. 23.	Final Proof Offered 4/23 1909 suspended pending contest of Bodkin.
May 7.	Protest special agt. filed.
June 30.	"H" of June 25,'09 holds entry for cancellation.
July 16.	Claimant notified of "H" of 6/25/09.-Reg. mail.
Oct. 22.	"H" of Oct. 18, '09 calls for report on "H" 6/25,09.
Oct. 22.	Appeal filed by Contestee Oct. 21, '09.
Nov. 4.	" " " to Comr.
Nov. 23.	"H" Nov. 18/09, Papers to Secry. on appeal.
1910.	
Jan. 18.	"H" of Jan. 31, 10 transmits Deptmt'l decision in case Bodkin vs. Edwards.
1910.	
Jan. 20.	Notice "H" 1/12/10-to Claimant-reg. mail.
Feb. 19.	Service " " "
Apr. 25.	"H" 4/19/10, cancels entry under contest of P. H. Bodkin.
May 4.	Notice" to Edwards.
" 4.	" " " Andrew G. Park, Atty. for Bodkin by reg. mail.
May 10.	Service accepted Reg. mail 5/7/10 by Park, Attorney for Bodkin.

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1913.
June 5. Supplemental Brief for Appellant filed.
" 11. " " trans. G. L. O.

1914.
Sept. 3. Application for motion to consider final proof filed.
Sept. 27. Appln. for motion to consider final Proof to G. L. O. for consideration.
Apr. 3. 1915. "F. S." of 3/30/15 finally closes the case, denies motion to consider final proof, and without right of appeal.
" 6. Copy to claimant.
June 18. Check No. 977 returns $6 to Neighbours.

I, Vene Bloomer, Register of the United States Land Office, hereby certify that the above and foregoing is a true and accurate copy of the Serial Register record relative to the homestead entry therein mentioned, which was transmitted to this Office from the Los Angeles Office at the time this Office was established.

VENE BLOOMER,
Register."

19. There was thereupon introduced in evidence, entries in the serial docket now in the Land-office at El Centro, California, touching upon the homestead application of Patrick H. Bodkin for the same land.

107 "Kind: Hd. Serial No. 010,652.
Name, Patrick H. Bodkin.
Address, Neighbours, Cal. 1/14/14.
Description of land, section N. E. ¼ 11, township 7 S., range 22 E., area, 160.

Notations.

1910.
May 18. Application Suspended pending hearing as to character of land U. S. Surv. Gen. letters 4/16 & 5/13 10 receipt No. 363993 Fees $16.

1912.
May 28. Address changed to 464 E. Adams St. L. A.
" 22. Restored Telgm. May 22, 1912.
June 1. Entry allowed.
Notice of Election mailed June 20, 12.
Nov. 26. "H." 11/21/12 rejects Edwards appln. & holds Bodkins' entry intact.
" 26. Service accepted by F. E. Dunlap.
Dec. 3. Affidavit filed stating settlement made on entry Nov. 25, 1912.

1913.

Jan. 21. Appeal filed by Wm. B. Edwards (010583).
Mch. 3. Add'l report on H. 11/21.12 sent to G. L. O.
108

Sept. 10. "H." 9/4/13 transmits dept. decision denying motion for hearing and leaving this entry intact.
9/20 13. Bodkin advised Secy. denies motion for rehearing and leaves entry intact.
Nov. 4. H. 10/31/13 affirms R. & R. subject to appeal.
" 10. Notice of H. 10/31/13 sent to claimant; Reg. Mail.
Feb. 4, 1914. H. of 1/30/14 calls for evidence of service.
Feb. 5, 1914. G. L. O. advised we have requested P. M. for duplicate.
Mch. 3. Evidence of service to G. L. O.
Mar. 6, 1914. Canceled by relinquishment. 2.00 P. M.
May 23, 1914. H. of 5/16/14 closes case, transmitting deptl. decision rejecting Edwards' appln. for reinstatement of 010583.
June 1. Copy of H. 5/16/14 to Edwards 010583.
Jun. 16, 1914. H. of 6/10/14 transmits dept'l decision denying motion for rehearing filed by Edwards and closing case.

1915.

July 12. F. S./D. 7/8/15 dismissing protest of Edwards.
" 19. Notice of F. S. D. 7-8-15 sent to claimant Ord. Mail. El Centro, California, February 3, 1919.

I, Vene Bloomer, Register of the United States Land Office,
109 do hereby certify that the above and foregoing have been compared with the original now on file and in use in this office, and is a true and accurate copy thereof.

VENE BLOOMER,
Register."

20. There was then introduced in evidence, a letter dated September 28th, 1914, signed by the Register and Receiver of the United States Land office at Los Angeles, touching the question of the protest filed by plaintiff as to the scrip applications of the defendant. This letter was read into the record and is as follows:

"Department of the Interior,
United States Land Office.
Los Angeles, Calif., Sept. 28, 1914.
(Place) (Date)

Mr. W. B. Edwards,
50 Stillman Ave.,
Redlands, Cal.

SIR:

We have the honor to acknowledge receipt of yours of the 26th inst., and in reply beg to state we have conferred with Mr. Buren,

former Register of this office, in regard to the matter therein referred to and he states that the information given you with reference to the right of appeal in the event of your protest being rejected was correct.

It appears, however, that these protests were forwarded to the
110 General Land Office at Washington by the clerks of this office without any action having been taken thereon. We are of the opinion that action should have been taken on the protests by this office and we think should have either been allowed or rejected and notice thereof sent you. Since they are now in the General Land Office it appears that the proper thing for you to do is to communicate direct with the Commissioner and request that he either return the protests to this office for action or act upon them himself.

Very respectfully,

JOHN D. ROCHE,
Register.
ALEX. MITCHELL,
Receiver.

P. S.—Since writing the above, we find copy of a letter addressed to this office, from which you will note that the protests filed by you were acted upon by the General Land Office at Washington, D. C."

21. In connection with the same subject there was introduced a letter of the Commissioner dated October 5th, 1914, which *are* as follows:

"In reply please refer to E. S. D.—Los Angeles 022,869-70-71-M. A. M.
2 L. 1 x (R. & R.)

Address only the Commissioner of the General Land Office.

Patrick H. Bodkin, Assignee; involving the right of Peter Dieckmann (022869); Benjamin F. Howland (022870); and Gilford M. Dunn (022871).

111 Department of the Interior,
General Land Office,
Washington, October 5, 1914.

Mr. W. B. Edwards,
Redlands, California.

MY DEAR SIR:

I am in receipt of your registered letter, dated September 26, 1914, addressed to the Commissioner of this office and noted: "Deliver only to Commissioner," in which you state in part as follows:

That justice may be promoted and fraud prevented, you are earnestly requested to suspend further action towards granting patent to the N. E. ¼ of Sec. 11, T. 7 S., R. 22 E., S. B. M., under the S. A. H. scrip location of Patrick H. Bodkin until the protestant in

said action may be accorded an opportunity to appeal from the action of the Los Angeles office and submit argument on appeal.

In the absence of the Commissioner, I am replying to said letter.

112 By letter F. S. D. of July 15, 1914, the application of Bodkin (22859) was allowed, and the local officers were directed to issue final certificate on payment of the legal fee and commissions. Similar action was taken on July 25, 1914, on the application of Bodkin as assignee of Howland (022870), and his application as assignee of Dunn (022871), was held for rejection on July 16, 1914, and said case is now pending before the Secretary of the Interior on appeal, transmitted August 26, 1914. The history of your connection with said land and of the contests between yourself and Patrick H. Bodkin, was fully set out in said letter of July 15, 1914, from which it appears that your rights have been fully considered by this office and by the Department and determined adversely. You do not state in your letter that you have filed a protest against said applications of Bodkin, and the local officers have not transmitted any such protest, but it appears from a letter addressed by you to the Register and Receiver at Los Angeles on July 24, 1914, that you did file such protest. Said letter reads as follows:

Blythe, Cal., July 24, 1914.

Register and Receiver,
United States Land Office.

GENTLEMEN:

Please take notice that my present address is as noted
113 above, to which notice of action in regard to protest of Bodkin's scrip location of the N. E. ¼ of Sec. 11, T. 7 S., R. 22 E., S. B. M., may be mailed. Please file this notice with the protest.

Truly,
(Signed) WILLIAM B. EDWARDS.

No final certificates appear to have been issued as yet on the two applications which were allowed as above stated.

The Register and Receiver at Los Angeles, California, have been called upon by letter of even date to report the action taken pursuant to said letters and to inform this office whether or not a protest has been filed by you, and, if so, to transmit the same with report of their action thereon, without delay.

Very respectfully,

C. M. BRUCE,
Assistant Commissioner.

10-3 T. M."

22. There was then introduced in evidence and read into the record a flimsy, being a copy of a letter from the office of the Commissioner of the General Land-office under date December 23rd, 1914, which letter was as follows:

"In reply please refer to F. S./D.—Los Angeles 022,871—M. A M./2 L.
1 x 1 x (B. W. M.) Inc.

114 Address only the Commissioner of the General Land Office.
Patrick H. Bodkin, assignee of E. G. Schoonover, admr. estate of Gilford M. Dunn.
William B. Edwards, Protestant.
Application under Secs. 2306 and 2307, R. S., allowed. Secretary's decision promulgated.
Alleged protest dismissed, without right of appeal.

Department of the Interior,
General Land Office,
Washington, December 23, 1914.

Register and Receiver,
Los Angeles, California.

SIRS:

By letter F. S./D. of July 16, 1914, the above-entitled application, filed in your office March 6, 1914, to enter under Secs. 2306 and 2307, R. S., the W. ½ N. E. ¼, Sec. 11, T. 7 S., R. 22 E., S. B. M., containing 80 acres, was consid-red, clear-listed as to deposits of coal or other minerals, in accordance with the letter of the Director of the Geological Survey, dated May 27, 1914, the evidence of posting and publication and no-protest report of the chief of field division was stated to have been furnished, and the application was held for rejection for the reason stated in said letter, *was held for rejection for the reason stated in said letter*, namely,

115 that the right vested in the minor orphan children, John G. and Murphy G. Dunn, as held by the departmental decision in the case of John H. Mason (41 L. D., 361), and that the assignment of the administrator, did not, therefore, constitute a proper basis for the right claimed by the applicant.

The right is based on military service of Gilford M. Dunn in Co. "G", 2nd Regiment, Missouri S. M. Cav., from November 14, 1863, to November 7, 1865, and on H. E. 738, made by Gilford M. Dunn, at Little Rock, Arkansas, March 30, 1867, for the W. ½ N. E. ¼, Sec. 5, T. 18 N., R. 1 W., 5th P. M., containing 80 acres, which was canceled December 11, 1876, for failure to submit proof within the statutory period.

Appeal was duly filed from said decision and subsequently dismissed at the request of the applicant, for the reason that additional evidence had been submitted, which, it is claimed, will meet the objections raised by this office to the application. The case was accordingly remanded Oct. 31, 1914, for consideration of the additional evidence.

Gilford M. Dunn was entitled to an additional right for 80 acres, based upon said service and original entry. He died in Randolph County, Arkansas, in the month of March 1872.

In said letter of July 16, 1914, a statement was made as to the con-

tests in which the N. ½ of said Sec. 11 had been involved.

116 As one William B. Edwards has transmitted to this office certain papers in the nature of a protest, and request for suspension of further action on the applications of Bodkin, involving all of the N. E. ¼ of said Sec. 11, it will be necessary to again state briefly the history of the various attempts to acquire title to the N. ½ of said Sec. 11.

On May 18, 1903, Jacob L. Geiger made H. E. 10239, for the N. W. ¼ of said Sec. 11, T. 7 S., R. 22 E., S. B. M. Affidavit of contest was filed against said entry on Jan. 30, 1908, by Florence V. Bodkin. Said contest was decided in favor of contestant March 13, 1908, the entryman having relinquished his entry March 7, 1908, after notice of the contest had been served on him. The Register notified Florence V. Bodkin, July 1, 1908, that the land was withdrawn September 12, 1903, and so remains withdrawn; that contestant has a preference right of entry for thirty days after the land shall have been restored to entry and that during said time no one has a right to take possession of said land or to settle upon or reclaim it adverse to her. The withdrawal mentioned was made under the first form of the Reclamation Act, and the land was restored from said withdrawal January 10, 1910, opened to settlement

April 18, and to entry May 18, 1910. On the request of the

117 Surveyor General, it was suspended pending an examination as to the character of the land, and was relieved from such suspension May 22, 1912. Florence V. Bodkin executed her homestead application (010,578), pursuant to said notice of her preference right, on May 18, 1910, and she died March 25, 1912. *He* entry was placed of record June 1, 1912.

On May 18, 1910, Charles E. Wells, of Blythe, Cal., filed his homestead application (010,591), for said N. W. ¼, which was rejected by your office May 24, 1912, on account of conflict with homestead application 010,578, of Florence V. Bodkin, for said land, filed May 18, 1910, under her preference right in the case of Bodkin v. Geiger. The decision of your office adverse to Wells was affirmed by letter "H" of this office November 15, 1912. Appeal was duly filed from said decision, and on May 27, 1913, same was reversed by the Secretary of the Interior, citing Garvey v. Tuisks (41 L. D., 510). The Secretary concluded:

Bodkin's entry is accordingly canceled, and the application of Wells will be allowed in the event he makes proper showing of present qualifications to make homestead entry for the tract.

On August 29, 1913, a motion for rehearing of the decision of May 27, 1913, was denied. On January 3, 1914, petition for the exercise of supervisory authority was considered, the rights

118 of the parents of Florence V. Bodkin to exercise said preference right as her heirs, were taken into consideration, also the fact that her father, Patrick H. Bodkin, was at the time claiming the N. E. ¼ of said section under a homestead entry made by him. The Secretary stated:

In reference to Patrick H. Bodkin, he may not perfect both homestead entries, as he could not comply with the law as to both, but he

may elect which he will prefect; and the fact that he has made homestead entry in his own right does not preclude his election to make and perfect homestead entry as co-heir with his wife, based upon the application of his daughter, notwithstanding his present entry or Wells's appearance in the case. Thirty days from notice of this decision is, therefore, hereby allowed the father of said Florence V. Bodkin, appearing herein as one of her heirs, to elect whether he will relinquish his present homestead entry and make with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application; at the expiration of which period adjudication will be had. The case is remanded for action in accordance with the foregoing.

Said decision was promulgated by letter "H" of January 26, 1914.

On March 18, 1914, you reported that, pursuant to notice of said decision, Patrick H. Bodkin, on March 6, 1914, filed H. E. 022872, for the N. W. ¼ of said Sec. 11, which was suspended for
119 evidence of naturalization. The record of his naturalization was furnished on March 9, 1914. You placed the entry of record on said date and relieved it from suspension. On the same date, Bodkin relinquished his H. E. 010652, for the N. E. ¼ of said section. By letter "H" of May 2, 1914, the cancellation of Bodkin's H. E. 010652 was noted of record, H. E. 010591, of Wells, for the N. W. ¼, was canceled, and the contest case of Wells v. the heirs of Bodkin, was closed.

On September 22, 1914, said Charles E. Wells filed his affidavit of contest against H. E. 022872, which you rejected on the same date because the allegations of contest did not constitute facts sufficient to warrant a cause of action. Wells appealed from said decision, and you transmitted the papers with your letter of November 1, 1914, and said contest case is now pending in this office and will be considered in another communication.

On December 1, 1902, William B. Edwards made H. E. now designed as 02472, for the N. E. ¼ of said Section, and on January 30, 1908, Patrick H. Bodkin filed a contest against the said entry, pursuant to which the same was canceled April 19, 1910, and the contest case of Bodkin v. Edwards closed. On May 18, 1910, William B. Edwards filed application to make a second homestead entry for said N. E. ¼, serial 010583, alleging residence on the
120 tract since April 18, 1910. Said application was suspended pending the decision as to the character of the land. On May 18, 1910, Patrick H. Bodkin filed his H. E. 010652, for said N. E. ¼, in the exercise of the preference right acquired under his successful contest against Edwards. The application of Bodkin was also suspended pending the decision as to the character of the land. The land was restored from suspension May 22, 1912. On said date the entry of Bodkin was allowed, and the application of Edwards was rejected for conflict therewith. From said action Edwards appealed. The action of your office was affirmed by letter "H" of Nov. 21, 1912, subject to the right of appeal. Appeal was duly filed from said decision, and the same was affirmed by the Secretary of the Interior May 27, 1913. On August 21, 1913, motion for

rehearing of the decision of May 27, 1913, was denied, and October 2, 1913, petition for the exercise of supervisory authority was also denied.

On September 11, 1913, prior to the decision last above mentioned, Edwards filed an application in your office to contest the entry of Bodkin, chargin- that Patrick H. Bodkin filed on land covered by the open and notorious settlement, residence, occupation and cultivation of myself, W. B. Edwards; that my settle-
121 ment right antedates any possible preference right claimed by Bodkin; that Bodkin never legally established his residence nor cultivated the land, and that his preference right was obtained and his entry made for speculative purposes, he having offered to sell to Mrs. Russell, of Hemet, California, and others. Said application was rejected by your office on the grounds (1) that the allegations were res judicata, and (2) that they were insufficient to warrant a hearing. It appears that Edwards appealed from said decision, but his ppeal is not filed with the contest case of Edwards v. Bodkin (010583). It is presumably filed with the entry of Bodkin (010652), which appears to have been misplaced in the files. On October 31, 1913, this office, by letter "H," affirmed your action (1) for the reason that the rights of Edwards under his alleged settlement and occupancy had already been adjudicated, (2) that the charges that Bodkin had never legally established a residence or cultivated the land, are mere conclusions, as to the correctness of which it can not be left to the contestant to determine, and (3) that under the long and well-established rules of the Department, a charge that an entryman has offered to sell his interest in the tract, is not sufficient to sustain the charge that his entry was made for speculative purposes. You were directed to notify Edwards
122 of said decision and of his right of appeal. Appeal was filed from said decision, and on March 20, 1914, the Secretary of the Interior affirmed the action — this office, stating:

This appeal has not been served upon Bodkin, as required by the Rules of Practice, and the same should not have been transmitted to the Department. It is properly subject to dismissal on motion made by Bodkin for that reason. No merit, however, appears in the contentions made therein as to the decision appealed from, and said decision is affirmed and the case is hereby closed under amended role 83 of practice (41 L. D., 175).

Petition for the exercise of supervisory authority was denied by the Secretary April 20, 1914. After reciting the prior action of this office of October 31, and of the Department of March 20, the Secretary stated:

It is stated in this petition that Bodkin relinquished his entry March 9, 1914, which Edwards contends, operated to invest him with a right to reinstatement of his own prior entry for said lands, canceled and the case closed on Bodkin's contest, as above stated.

The record before the Department does not show Bodkin's relinquishment of his entry, the same doubtless not yet having been transmitted by the local officers. Admitting such to have been filed, however, no rights accrued to Edwards by virtue thereof, his contest

affidavit then pending on appeal being insufficient in sub-
123 stance. His rights under his original entry for said lands ended when cancellation of that entry — under Bodkin's contest. This petition is denied.

Attached to said petition is a request of Edwards for reinstatement of his original entry, also an affidavit which he designates "Affidavit protesting acceptance of S. A. H. location of Patrick H. Bodkin, for the N. E. ¼ of Sec. 11, T. 7 S., R. 22 E., S. B. M." All of said papers were considered by the Department in its decision denying the petition for exercise of supervisory authority, dated April 20, 1914. The contest case of Edwards v. Bodkin was closed by letter "H" of May 16, 1914, and the decision of the Department promulgated.

On March 6, 1914, the date of filing his relinquishment of H. E. 010652, for the N. E. ¼ of said section, Patrick H. Bodkin filed his three separate soldiers' additional applications for said land, 022869, as assignee of Anna Dieckmann, widow of Peter Dieckmann, for the N. E. ¼ N. E. ¼, allowed by letter F. S./D. of July 16, 1914; 022870, as assignee of Benjamin F. Howland, for the S. E. ¼ N. E. ¼, allowed by letter F. S./D. of July 25, 1914, and 022871, as assignee of E. D. Schoonover, Admr. Estate of Gilford M. Dunn, for W. ½ N. E. ¼ said Sec. 11 (the application herein), held for rejection as stated in the beginning of this letter. Final certificates issued on 022869 and 022870, on September 23, 1914, and
124 said two entries are now pending in this office, awaiting final action looking to their approval for patent.

On October 2, 1914, a registered letter was received from W. B. Edwards, dated September 26, 1914, at Redlands, Cal., requesting this office to suspend further action toward granting patent to the N. E. ¼, Sec. 11, T. 7 S., R. 22 E., S. M. B., S. A. scrip location of Patrick H. Bodkin, until the protestant in said action may be accorded an opportunity to appeal from the action of the Los Angeles office and submit argument on appeal.

As it appeared from the records that said Edwards had advised your office from Blythe, Cal., July 2, 1914, to notify him at the address given in regard to a protest of Bodkin's scrip location, this office, by letter of October 5, 1914, directed you to report what action had been taken on said serial 022869 and 022870, and also to transmit the protest if any had been filed in your office by said Edwards and to report the action taken thereon. By letter of the same date, Edwards was advised of the status of the three applications of Bodkin and of the fact that you had been directed to make report, as above stated. On October 15, 1914, you reported that final certificates had issued on 022869 and 022870, and that the only protest filed by Edwards in your office was transmitted to his office with the returns of the month of March, 1914.

125 On October 13, 1914, another communication was received from Edwards, which he designated "Motion to reinstate protest, accord a hearing to protestant and remand case to Register and Receiver for decision in regular order." On October 19, 1914, a reply was received from Edwards to the letter addressed to him

October 5, 1914. As the application herein, 022871, was then pending before the Department *for consideration by letters S. F./D. of October* on appeal, all of said papers were transmitted to the Department for consideration by letters F. S./D. of October 19, 1914, and October 24, 1914. On October 31, 1914, all of said papers were returned to this office from the Department with the information that the case herein had been remanded as stated in the beginning of this letter, and that no action by the Department appeared necessary on said papers.

It appears from the foregoing that the right of Edwards to the N. E. ¼ of said Sec. 11 has been twice adversely determined by the Department. His request for suspension of action and for remanding the alleged protest to your office is, therefore, denied, and it is held that Edwards has no right of appeal from this action. You will, however, notify Edwards that final action will be deferred for twenty days from service of notice hereof to enable him to apply to the Secretary of the Interior for an order certifying
126 the record under rule 78 and 79 of the Rules of Practice.

You will also notify Bodkin that he will be allowed thirty days in which to pay the legal fee and commissions.

Should Edwards file an application for such order within twenty days, you will transmit the same and await further instructions. Should he fail to do so and Bodkin should tender the fee and commissions within thirty days from notice, you will place the entry of record in the name of Patrick H. Bodkin, assignee, involving the right of Gilford M. Dunn, and issue final certificate.

Three copies of the departmental decision remanding the case are herewith inclosed, also three copies of the latter returning said papers of Edwards.

Serve notice personally or by registered letter, and make report. Copy inclosed.

Very respectfully,

——— ———,
Commissioner.

12–12 T. M."

127 28. Counsel for plaintiff thereupon read into the record from the Transcript of the testimony taken at the hearing of the contest above referred to that portion of the testimony of Patrick H. Bodkin as offered, as follows:

"Q. Mr. Bodkin, you are acquainted with the land in question in this proceeding?

"A. Yes, sir.

"Q. When were you first on the land?

"A. Well, about January 20th, I think, along there, of the present year.

"Q. Have you been on the land since that time?

"A. Yes; I have been on there three different times since then."

"Q. Do you say positively the land had been abandoned?

"A. I say it appeared to be abandoned.

"Q. Didn't you say in your direct examination positively that it had been abandoned?

"A. I answered that it had been abandoned for six months last past. That is what I said.

"Q. You are prepared to swear positively to that fact, that it had been abandoned for six months last past?

"A. I was so informed.

"Q. Do you say positively, without any qualifications?

"A. I hadn't lived there. I couldn't state anything about that. I took the statement of people who had lived there, to be truthful men.

"Q. You didn't make any qualification. Do you wish to qualify the statement now that it appeared to you that it had been abandoned, instead of stating absolutely the fact that it had been?

"A. I don't think so."

128 31. After the introduction of that portion of the transcript of testimony of Patrick H. Bodkin, offered by plaintiff and taken at the hearing of the contest between the above entitled parties, and after the stipulation as to the whole evidence taken at such hearing, plaintiff took the stand in his own behalf.

He testified as follows:

My name is WILLIAM B. EDWARDS. I am the plaintiff in this case.

"Q. Calling your attention to a homestead application filed by you December 1, 1902, state if you went upon the land described in that application after making the application.

Mr. Stone: That is objected to as incompetent, irrelevant and immaterial, the issue having been determined by the Land Department, and being purely a question of fact as to whether he went upon the land; it being determined adversely to him by all the departments of the Government, and he had full opportunity on motion for rehearing to deny it, and the decision is final.

Mr. Willis: We only seek to offer proof of his settlement and residence, and complying with the land laws under the second form of withdrawal, up to the first form of withdrawal, a period of seven or eight months.

The Court: I will overrule the objection."

129 Witness continued to testify:

Yes, sir; I did. It was about the first of January. The entry was made about the 1st of December. I went on the land on the 1st of January, 1903. I commenced building a house, and put down a well, built a corral, cleared off part of the land, got a team and wagon and tools, etc. Did not complete the house at that time.

"Mr. Stone: Your Honor understands our objection goes to all this?

The Court: Yes.

Mr. Stone: And we have an exception to the ruling?

The Court: Yes, sir. The objection will be overruled and the exception entered."

Being questioned by the court, witness continued to testify:

Well, I started to build an adobe house. I had the adobe bricks moulded and dried, and I had the lumber taken up with me from Yuma to complete it, and I got hurt. I got another person to lay the bricks up and finish it out, put the doors in and put a roof over it. Arrow weed roof. Had the house entirely enclosed. It was about 12 by 14. It was more than 12 by 14. At least 12 by 14. The door was an ordinary size door. It had no floor in it. It had an opening for a window. The top part was completed with lumber. The window was the usual size. I think about 2½ feet by 4½ feet.

130 By Mr. Willis:

"Q. Did you between January 1st and the date of the first form of withdrawal on September 8, 1903, remain on the land continually?

A. I didn't just get that.

By the Court: Did you stay on the land there continually up to the withdrawal of the land?"

Well, I didn't stay on the land continually after I was hurt. I went to Imperial Valley in March. I got back in September. I stayed there on the land from January until March. Then I got kicked by a horse and broke my rib and went to Imperial Valley to be doctored for one thing, and also I got out of money for another thing, and I had to get money by some means. About the 1st of September I came back to the land. I stayed on there a few days, and I heard of this first form of withdrawal, and information was that it was withdrawn in order to construct a high dam at Yuma and back the water over it. That dam was to be 60 feet high. I read everything I could get on the subject, informed myself the best I could.

In response to questions by the Court witness testified:

That well I put down was a driven well. I think the pipe was 20 feet long. I got water. Did not have a windmill. Had a pump on it. A hand pump. At that time I cleared only 3 or 4 acres. I did not measure it, but I think so. The brush was cleared
131 off completely. The land was fit for cultivation otherwise than it would have to be watered.

Continuing examination by Mr. Willis, witness testified:

I did not at that time obtain water enough from this well for irrigation purposes. It was possible to get water in that way for irrigation purposes in that neighborhood by going to a large expense. It was not practical for another reason, that the water was largely mineral and would not produce very long. There was some natural growth on the land. Some mesquite trees and some sage brush. A crop of any character could not be raised on that ground without irrigation. The ground was suitable for cultivation of crops with the use of water. I expected then that the government would install the system. I first made effort to procure water for irrigation in 1908

from the Holabird Land & Water Company. Prior to 1908 there was no means of making application, no possibility. There was no company to get water of and no settlers could do it individually on account of the expense. The situation there was such that it required cooperation of homesteaders, or the help of the government, one or the other. An individual could not on limited means procure water from any source. In 1908 I first found I could get water from the Land Company. I went back there every six months to see what the chances were of doing anything, and at that time I found that the settlers were able to buy water of the Land & Water Company
132 by making their own ditch to the Land & Water Company's lines. That was about the first of April, 1908. I received a letter from the defendant at that time after I had gone upon the—I was going to the land. I got it at the Palo Verde Postoffice as I went past. I had my mail forwarded when I started up there. The letter in question I found at the Palo Verde Postoffice, forwarded to me there from some other address. That was the first information I had of the contest. I was preparing to cultivate and improve the land as soon as I could possible to do so. I arranged to get water then. There was no water available prior to that time. I got water from the Colorado River. I was working on the land when the notice of contest filed by Mr. Bodkin was served on me. I was clearing and leveling it, bordering it. I was living on the land then. The house I had built was destroyed. I was building another house at the time. We were living in the open. I think that is the most arid country in the United States. I know the limits of what is commonly called the Blythe Rancho. It is between the government land and the river. Section 11 is about 9 miles from the River. The ditch or canal from which I obtained the water, with reference to Section 11 was northeast. The old ditch was some distance. The ditch we connected with was a new ditch, the Company made that year. The construction of the new ditch, and the cleaning out of the old one by the Land Company enabled me to procure
133 water. There were other settlers, or homesteaders on adjacent quarters to mine, or adjacent sections.

After the 1st of April, 1908, when I returned to the land I think I continued to reside upon the land until some time in November, 1913. During the period from April 1st, 1908, to November, 1913, I remained on the land residing there continuously. I made improvements, cultivated 87.77 acres, procured a water right, raised crops. At the time I first went upon the land, and up until 1908, there was no canal then in existence from which water could be brought to the quarter section. There was an extension of the old canal built afterwards by the Land & Water Company. The Land & Water Company was occupying the Blythe Rancho.

After the withdrawal of these lands under the first form on September 8, 1903, I made an effort to procure water for irrigation in the year 1908. The withdrawal prevented any more settlers from getting in, and prevented cooperative effort to procure water. With reference to the purposes and aims of the government with reference to furnishing water, I went simply on my understanding of the

meaning of the reclamation law. The government did nothing under that first form withdrawal as far as I know. At the time they were surveying the lands I talked with the engineer. After the first form of withdrawal the government did nothing on the ground, or for the ground, that I know of. In 1908 the settlers undertook to get water. The withdrawal of the land under the first form
134 interfered with cultivating the ground and raising crops thereon to the extent that it interfered with getting water. Cannot produce a crop without water. Water was finally obtained for other quarter sections as well as mine. Gradually the entire neighborhood was irrigated.

In response to question by the Court, witness testified that he was born in Illinois in the year 1862.

On cross-examination by Mr. Stone witness testified as follows: It is not a fact that I was not on the land at any time within the six months before January 30, 1908.

I returned to the land each six months with the exception of the year I got the leave of absence. I didn't set down the dates. I was on the land last prior to January 30, 1908, either in September or October of 1907. I couldn't answer you. I believe that is the only time in the six months. I didn't stay a great while, just long enough to go back and *see* what the conditions were and go back where I was. I slept on the land—probably not more than two or three nights. Went back to Imperial Valley then.

I was present at the hearing before the local land office here, when I was contested by Mr. Bodkin. I was not represented by an attorney. I represented myself. I know Mr. Neighbors. He lived about a mile, a mile or a mile and a half from this land, the Northeast Quarter of Section 11. He lived there sometime—for several years prior to January 30th, 1908. He is the same Mr.
135 Neighbors that testified in the contest hearing. I heard his testimony. His evidence in the Transcript shows that he hadn't been back to the land within the six months *proceeding*. He went to the east. He said he went east on a visit. My filing on this land in 1902, before it was withdrawn was a homestead under the reclamation act, not a desert land entry. From 1903 to 1910 this land was continuously withdrawn from any kind of entry. That is as a homestead, or desert claim or otherwise. From 1903 to May 1910, it was withdrawn from all forms of disposition. I had made my entry. During that time Mr. Bodkin contested me. He was awarded a preference right I spoke of. I appealed that decision first to the commissioner of the general land-office. I suppose all of the evidence taken here at the local land-office relating to this entry and so on was certified up before the commissioner. He affirmed the decision of the land-office here on the facts. Then I appealed to the secretary of the Interior on the same decision, and the record was all transmitted to his office, and he also decided the case against me, affirming the other land-office departments. Yes, I made a motion for rehearing before the Secretary *the Secretary* of the Interior and I argued the case on briefs. I appealed to the highest authority of the Land-office. Mr. Bodkin didn't serve me with anything until his

application for contest after he had relinquished his homestead entry as it states in the complaint.

136 The circular from the government concerning people who expected to remain on the land and acquire either by homestead entry, or desert land entry, to stick to the land and not leave it, and not go away, and not let the six months intervene, was a circular, as I understand it, to try to put the man who had entered the land on a different footing than the reclamation law put him. The circulars as I understand it, as I remember it,—wish to say now that I did not get the circulars until August, 1912, but I will waive that part of it as far as I am concerned,—the circular as I understand it was to the effect that the settler would have to proceed just the same whether the government got water to the land or not. Under the old homestead law the government did not require you to irrigate at least 40 acres of this 160 acres of land or put water on it. After the reclamation law it provided that the government should install a system. You were required to reclaim at least half of the land. This I did before I made my proof. There was water accessible from 12 to 15 feet of the surface if you had sufficient means to get water, but I say it wasn't practicable to reclaim the land in that way even if you had the means. I did not go ahead and prove up under my homestead entry because it was necessary for me to live off the land. I could not make a perfunctory proof if I were so inclined. The necessity of making a living kept me from proving up on my homestead. I did prove up. The government did let me

137 take it as a homestead *and the government did not accept my final proof.* I didn't get any patent or certificate of any kind *because they claimed Mr. Bodkin's contest was prior* and the government did not accept my final proof because they claimed Mr. Bodkin's contest was prior. I entered the land before it was withdrawn from all forms of entry. The withdrawal did not suspend my rights. I was informed at the Land office when I offered my final proof that the contest would have to be considered first. At the hearing between me and Mr. Bodkin on the contest the evidence was offered on the issue that I had complied with the law as far as I could under the conditions, and on the issue that I had not resided there for six months before the contest was held, it was offered as to that. I think I got a copy of the affidavit of Mr. Bodkin served on me before the contest hearing.

I worked around Holtville in 1907. I did not vote at Holtville or Imperial in 1907 and 1908 both. I voted once. I don't remember the date. I worked there from the time I left the plate until I came back in 1908. I worked around different parts of the Valley. I went down there in 1903 and I stated I drove back and forth every six months and worked in Imperial Valley until 1908. I couldn't tell to save my life what year I voted in Imperial Valley. I voted at Holtville.

138 GEORGE W. McFEE, a witness on behalf of plaintiff, testified as follows:

I live at Palo Verde Valley. Have since 1896. Am familiar with Section 11, Township 7 South, Range 22 East. Was acquainted with that section in the fall of 1902. I first met the plaintiff, Mr. Edwards, about that time, or just before that time. I guess I am the man that put Mr. Edwards on that section.

"The Court: I don't see the importance of this thing.

Mr. Willis: Well, only testimony with reference to his first settlement, and then the interference by reason of the withdrawal.

The Court: Well, I know, but that is a matter that you have got to prove in the Land Office.

Mr. Stone: We object to that.

The Court: If you have not made that proof.

Mr. Willis: That proof has been made.

The Court: Well, why make it here?

Mr. Willis: Well then, let me confine myself to the proof of interference. That was not considered by the Land-office, and that is one of the things taken into consideration by the Circuit Court of Appeals. No consideration was given to the fact that the land at the time of the contest was under a first form of withdrawal, thereby being interfered with, and it is only on the question of interference that I seek to get this testimony.

The Court: Well, proceed.

139 Mr. Stone: We except."

I was there when Mr. Edwards went upon the land. I showed him the land myself.

"Mr. Stone: May it be understood that our objection runs to all that?

The Court: Yes, and exception entered."

Witness continues to testify:

With reference to the time when the land in that neighborhood was withdrawn under the first form of withdrawal on September 8, 1903, I was then in the Valley. The withdrawal stopped all the settlers from going in there and stopped our chances of getting water from the River to irrigate our land with. Was not able to procure any water for irrigation purposes on Section 11 from September, 1903 to the summer of 1908. During that time I observed nothing done by the government toward furnishing water upon any of those lands, more than just a survey. There was no water on or near Section 11 which could be utilized for irrigation purposes.

With the testimony of witness McFee, plaintiff rested his case.

"Mr. Stone: It may be understood that the court may consider any portion of the testimony taken at the trial that is in the record.

Mr. Willis: Yes, sir; that was understood.

The Court: Yes, you can call my attention to it. All the proceedings in the Land Office are in evidence.

140 Mr. Willis: Excepting the transcript of the testimony taken at the contest, and that it is stipulated may be used by the court upon consideration of this case, without its actual introduction into the evidence.

The Court: Well, it may be considered as part of the evidence, and then if you make up a record you can take out such parts as present your question.

Mr. Willis: Yes, sir.

The Court: We have a stipulation on that subject."

141 D-23378.
"H."

WILLIAM B. EDWARDS

vs.

PATRICK H. BODKIN.

Los Angeles 010,152, 010,583, Conflicting Preference Right, and Intervening Applicants. Motion Denied.

Motion for Rehearing in re Departmental Decision of May 27, 1913.

Department of the Interior,
Washington, Aug. 21, 1913.

The Department has given careful consideration to motion for rehearing, and to oral arguments presented thereon, filed in the above entitled cause wherein the Department rendered decision May 27, 1913, affirming that of the Commissioner of the General Land Office which affirmed the action of the local officers in rejecting the second homestead application filed by William B. Edwards May 18, 1910, based upon alleged settlement April 18, 1910, for certain described lands and allowing the homestead application filed the same date by Patrick H. Bodkin claiming a preference right as successful contestant against a prior entry for said lands, made by said Edwards, canceled April 19, 1910, on Bodkin's contest.

It appears that said prior entry was contested January 31, 1908, by Bodkin while said lands were embraced in a first form withdrawal under the reclamation act, in accordance with regulations then in force allowing contests notwithstanding such withdrawals, and hearing was duly had in September, 1908, resulting in a decision in Bodkin's favor, affirmed by the Commissioner June

142 25, 1909, and by the Department January 6, 1910 and April 12, 1910, and in cancellation of the entry April 19, 1910, as above stated. Said lands were restored January 10, 1910, to settlement on April 18, and to entry on May 18, 1910.

It appears further in argument that Edwards after his proven default as to residence in said contest case went upon said lands, was

residing there when his entry was canceled, and remained there thereafter; also, that Bodkin within six months after allowance of his entry attempted to establish residence thereof but was forcibly prevented by Edwards.

Edwards contends particularly that no preference right accrued to Bodkin because of the regulations of February 19, 1909 (37 L. D. 365), and that he as a settler on the land April 18, 1910, has superior right to make entry for said lands as a second entry under the act of February 8, 1908 (35 Stat. 6).

Said regulations of January 19, 1909, have by their terms no application to this case. They state that in "cases where contest has been allowed prior to such (a first form) withdrawal," such contest will be terminated ipso facto by such withdrawal, together with all rights under said contest. The contest in the present case was not allowed prior to withdrawal but pending the same and as above stated, in accordance with then existing regulations and had gone to hearing at least prior to said regulations of January 19, 1909. The latter's regulations were not entended to apply to such a case or to be retroactive, but to operate prospectively only, as expressly stated in the case of Fairchilds vs. Eby (37 L. D. 362), on
143 the decision in which said regulations were based, the Department stating therein "In the future" no contest would be allowed as to lands appropriated by the Government and such withdrawals would terminate contests pending at time of withdrawal.

Furthermore, even were this contest within the purview of said regulations, they could not by their own force operate to foreclose Bodkin's contest, and his contest was not in fact dismissed under said regulations. Upon restoration of the lands said regulations could have no possible application in the case and constituted no valid ground of objection to cancellation of the entry. The entry was, therefore, properly canceled under the contest and Bodkin earned a preference right accordingly against which Edwards' existing settlement on the land could not prevail. Thorbjornsen v. Hindman (38 L. D. 335). A perfected contest right is a statutory one which the land department cannot deny or disregard by regulation or otherwise. Beach v. Hanson (40 L. D. 607); Long v. Lee (41 L. D. 326).

The Department has given to this case, and to the similar cases orally argued with it, most careful consideration, in view of the contentions made, and can see no warrant for disturbing the concurring actions taken by the lower tribunals and by the Department.

The motion is accordingly denied.

(Signed) ANDREWS A. JONES,
First Assistant Secretary.

144 I, Frank Buren, Register of the U. S. Land Office, Los Angeles, Cal., hereby certify that I am such officer, and that the foregoing document is a copy of the original on file in this office.

[SEAL.] FRANK BUREN,
Register U. S. Land Office,
Los Angeles, California.

145 D-23378.
"H."

WILLIAM B. EDWARDS

v.

PATRICK H. BODKIN.

Los Angeles 010,652, 010,583, Conflicting Preference Right and Intervening Applicants. Petition Denied.

Petition for the Exercise of Supervisory Authority.

Department of Interior,
Washington, Oct. 2, 1913.

The department has given careful consideration to the petition for the exercise of its supervisory authority filed in the above entitled cause wherein decision was rendered August 21, 1913, on motion for rehearing in re departmental decision of May 27, 1913, denying said motion and holding that Bodkin has preference right to make entry for the lands involved in said cause which is prior and superior to the claim of Edwards. The petition is denied.

(Signature illegible.)
First Assistant Secretary.

Los Angeles, Cal., Oct. 28, 1913.

I, Frank Buren, do hereby certify that I am the Register of the U. S. Land Office at Los Angeles, California, that the annexed letter denying application for exercise of supervisory authority in re William B. Edwards vs. Patrick H. Bodkin, is a true copy of the original on file in the U. S. Land Office at Los Angeles, California.

[SEAL.] FRANK BUREN,
Agent.

Endorsed: Filed Nov. 1, 1913. A. B. Pileh, clerk, by O. A. Lowestrost, deputy.

146 34. Thereupon the cause was submitted to the Court for consideration and thereafter, to wit, on the — day ——, 1919, the court filed its conclusions in words and figures as follows, to wit:

"In the District Court of the United States, Southern District of California (Southern Division).

No. C-55, Equity.

WILLIAM B. EDWARDS, Plaintiff,

vs.

PATRICK H. BODKIN, Defendant.

Conclusions of the Court.

Henry M. Willis, Esq., of Los Angeles, California, for plaintiff.
Duke Stone, Esq., of Los Angeles, California, for defendant.

A complaint in this suit was passed upon by the court of appeals and reported in 249 Fed. 502. The complaint has been amended but not in any material respect as compared with the complaint passed upon by the said court. The facts, as stated in the opinion in that report, were proven at the trial. (The plaintiff offered no proof regarding the misconduct of any of the officers in the land office.) It follows, therefore, that the plaintiff is entitled to a
147 decree as prayed for in the complaint, unless the pleas in bar pleaded by the defendant defeat that right.

The first plea sets up a judgment obtained in the Superior Court of Riverside County in an action wherein the defendant here, Patrick Henry Bodkin, was plaintiff, and the plaintiff here, William B. Edwards, was defendant. The facts concerning that suit are these: Suit was filed June 3, 1912. It was an action in ejectment to recover possession of the land in controversy in this suit. The defendant answered the complaint and a trial was had on October 18, 1912. Judgment was entered in *was entered in* the cause on November 12, 1913, wherein it was adjudged that the plaintiff (Bodkin) recover of the defendant therein the possession of the land described in the complaint and $50.00 damages for rents and profits. On February 4, 1914, the defendant in the said cause filed a notice of appeal to the Supreme Court of California, and on the same day filed an undertaking on appeal. This notice of appeal and bond in pursuance thereof removed the case to the Supreme Court.

The court is of the opinion that the plea in bar, as above stated, does not defeat the right of plaintiff's recovery. The action in ejectment was merely to recover possession of the land based upon the legal title. And since the appeal has not been determined, the action is still pending.

The defendant also pleads in bar a judgment in a suit in the Superior Court of the State of California, in and for the
148 County of Riverside, entitled William B. Edwards V. Patrick H. Bodkin, being the same parties here in litigation. The facts, concerning that suit, in so far as material here, are as follows:

A demurrer was upon the following grounds: First, that the court had no jurisdiction of the subject-matter of said action; and second, that said first amended complaint did not state facts sufficient to constitute a cause of action. On June 8, 1916, the court made an order in words and figures following: 'Demurrer to Amended Complaint Sustained. 10 days.' On June 30, 1916, the court entered the following:

'* * * An order having been entered in this action on the 8th day of June, 1916, sustaining the demurrer to the amended complaint herein and granting plaintiff ten (10) days within which to amend, and plaintiff having failed to further amend his complaint, It is hereby ordered and adjudged that the amended complaint herein be and the same hereby is dismissed, and that the defendant have and recover its costs of the said plaintiff taxed at Fifty & 40/100 dollars. Dated June 30th, 1916. Hugh H. Craig, Judge.'

Other proceedings were had in said cause, with a view of having said judgment set aside. A motion to vacate the judgment was made. This motion to vacate the judgment has never been disposed of by the Superior Court of Riverside. The rule of res
149 adjudicata is stated by Sec. 1911, C. C. P., as follows:

'That only is deemed to have been adjudged in a former judgment which *appears upon its face* to have been so adjudged, or which was *actually* and *necessarily* included therein or necessary thereto.'

It will be seen that there are two grounds specified in the demurrer. One, that the court did not have jurisdiction and the other that the complaint did not state facts sufficient to constitute a cause of action. The judgment sustaining the demurrer does not specify upon what ground that the court sustained it. If the demurrer was sustained on the ground that the court had no jurisdiction, there would be no judgment upon the merits. Since it cannot be determined by an examination of the record upon what ground the court sustained the demurrer, it must follow that the judgment is not a bar. Besides, the proceedings show that the plaintiff was given leave to amend the complaint when the court made an order sustaining the demurrer. The plaintiff, however, never amended. It cannot be determined from the judgment entered in that case whether or not the court dismissed the complaint by reason of the failure of plaintiff to amend or by reason of the fact that the demurrer had been sustained to the amended complaint. It may well be that the
150 court on June 30, 1916, finding that the record showed that the plaintiff had been given leave to amend and had not amended, thought the case ought to be dismissed for want of prosecution by the plaintiff. The judgment shows that the complaint was dismissed but why it was dismissed, whether by reason of the fact that the demurrer had previously been sustained or by reason of the fact that the plaintiff had not amended, is not set forth. There is no judgment that the prayer of the plaintiff's complaint be

denied, nor is there a formal decree of dismissal. It is plain that it does not appear upon the face of this judgment that the controversy was decided or actually and necessarily included therein or was necessary thereto.

For reasons above stated, I am of the opinion that the last mentioned suit is not a bar to the plaintiff's right of recovery in this suit.

Civil Code of Precedure Sec. 1911,
Civil Code of Procedure Sec. 581,
Goldtree v. Spreckles, 135 Cal. 666,
Kirsch v. Kirsch, 113 Cal. 56,
Bissell v. Spring Valley Township, 124 U. S. 225.
Smith v. McNeal, 109 U. S. 426,
Russell v. Place, 94 U. S. 606,
Wiggins Perry Co. v. O. & M. Railway, 142 U. S. 396.

The plaintiff will prepare a decree as provided by the rules of the court.

OSCAR A. TRIPPET,
Judge.

Dated April 9th, 1919."

151 35. Thereafter, to-wit, on the 18th day of April, 1919, and in pursuance of said conclusions, the Court entered its Decree in favor of the plaintiff and against the defendant, which decree was filed with the Clerk of said Court on the 18th day of April, 1919, and is in words and figures as follows, to-wit;

"In the District Court of the United States, Southern District of California (Southern Division).

No. C–55, Equity.

WILLIAM B. EDWARDS, Plaintiff,

vs.

PATRICK H. BODKIN, Defendant.

Decree.

This cause came on regularly to be heard on the 4th day of February, 1919, being a day in the January term, A. D. 1919, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, before the Court, upon the amended bill of complaint of the plaintiff, filed on the 24th day of June, 1918, and the answer of the defendant thereto, and proofs having been offered and submitted by the respective parties on the 4th and 5th days of February, 1919, and the cause
152 thereafter having been argued on the 25th and 26 days of February, 1919, and on said last named day submitted to the Court for consideration and decision: and thereafter, to-wit, on the 9th day of April, 1919, being a day in the January term A. D. 1919,

the Court having duly considered the matter and being fully advised in the premises, announces and files its conclusions thereon:

Now therefore, by reason of the premises and upon consideration of the said amended bill of complaint, the answer thereto of the defendant, and the said proofs, it appearing to the satisfaction of the Court that the plaintiff is entitled to a decree declaring plaintiff to be the real owner of the real property described in the amended bill of complaint, and in the series of patents issued to the defendant and particularly mentioned and described in said amended bill of complaint, and decreeing that the defendant is a trustee holding the said series of patents and the title thereby conveyed for the use and benefit of plaintiff, and decreeing and ordering the defendant to transfer the title thereto to the plaintiff by a proper instrument of conveyance, it is, by the Court, upon consideration thereof:

Ordered, adjudged and decreed as follows, to-wit:

First. That the plaintiff, William B. Edwards, is the real owner of that certain real property, situate, lying and being in the
153 County of Riverside, State of California, and as particularly described in the amended bill of complaint as follows, to-wit:

The North East Quarter (N. E. ¼) of Section Eleven (11), Township 7 South, Range 22 East, San Bernardino Base and Meridian:

and as particularly described by parcels thereof, in United States Patents issued to and in the name of defendant, as follows, to-wit:

Patent No. 484407, issued July 28, 1915, for the West one half (W. ½) of the North East Quarter (N. E. ¼) of said section: Pat-
August 6
ent No. 485834, issued *July 23*, 1915, for the South East Quarter (S. E. ¼) of the North East Quarter (N. E. ¼) of said section: and Patent No. 485833, issued August 6, 1915, for the North East Quarter (N. E. ¼) of the North East Quarter (N. E. ¼) of said section:

Second. That the defendant, Patrick H. Bodkin is the trustee of the plaintiff William B. Edwards, and holds the said series of patents and the title thereby conveyed of the real property therein described and conveyed and hereinbefore particularly described, in trust for the use and benefit of the plaintiff.

And it is further ordered, adjudged and decreed that within 60 days after the entry of this decree, the defendant, Patrick H. Bodkin, shall make, execute and deliver to the plaintiff a good and sufficient deed of conveyance of the above described real property
154 in fee simple, conveying the title to said real property described in said patents, and hereinabove particularly described, to the plaintiff, and shall acknowledge the execution thereof so as to entitle the same to be recorded.

It is further ordered, adjudged and decreed that plaintiff have and recover of and from the defendant his costs herein incurred and taxed in the sum of $130.96 $—) Dollars.

Dated April 18th, 1919.

OSCAR A. TRIPPET,
Judge.

Approved as to form as provided by Rule 45.

DUKE STONE,
Atty. for Defendant.

April 18, 1919."

155 37. Thereafter, to-wit: on the 24th day of July, 1919, said petition for rehearing came on before the Court, and the Court after hearing the same, caused to be entered an order denying the same which is in words and figures as follows, to-wit:

"The Court at this time hands down his written opinion in the above entitled cause and the same is at this time filed. Said opinion denying defendant's motion for a rehearing."

and filed therein his opinion, or conclusion, in words and figures as follows, to-wit:

"In the District Court of the United States, Southern District of California (Southern Division).

In Equity. No. C 55.

WILLIAM B. EDWARDS, Plaintiff,

vs.

PATRICK H. BODKIN, Defendant.

Conclusion of the Court.

Henry M. Willis, Esq., of Los Angeles, California, for the plaintiff.

156 Dan V. Noland, Esq., and Duke Stone, Esq., of Los Angeles, California, for defendant.

This is an application for rehearing. Upon the trial of the case great stress was laid upon the judgments introduced in the case and very little was said concerning the proofs relative to the allegations in the complaint. On the application for rehearing it was contended that the proof does not support the allegations in the complaint in several particulars. Great controversy arose during the argument, concerning the meaning and importance of the following quotation from the opinion rendered by the circuit court of appeals, to-wit:

"On May 5, 1908, the defendant served a notice of contest upon the plaintiff, in which it was charged that the plaintiff had never established a residence upon the land, had made no improvements thereon, and that he had abandoned the same for more than six months. The defendant, in support of this contest, made oath that he did not know and had no means of knowing the facts. This was insufficient to initiate a contest. Schofield v. Cole, 1 Land Dec. 140."

This is a correct statement of what the allegations of the complaint are, and the syllabus No. 5 in the opinion is as follows:

'A notice of contest against an entryman on public lands, in support of which the contestant made oath that he did not know
157 and had no means of knowing the facts, is insufficient to initiate a contest.'

This syllabus correctly interprets the decision on this subject. The proof adduced at the trial of the case supports the allegations in the complaint in this regard. There is no ambiguity in this statement of the court. It certainly states that no contest was initiated. The attorney for the defendant argues that the court did not mean to decide that if the affidavit of contest filed by the defendant was verified positively by him that that would not initiate a contest, and he argues that it would initiate a contest, even though it subsequently developed that the contestant did not know anything about the facts and only testified on information and belief. He argues that if the affidavit of contest be made positively,—it does not matter whether contestant knows the truth of it or not,—it would initiate a contest. He points out that the authority cited by the court of appeals is a decision of the land office based upon an affidavit in support of a contest that was sworn to by the witness only upon information and belief, and the office held that such a supporting affidavit was not sufficient. In other words, the defendant argues that if the contestant swears positively to the facts, it makes no difference whether he knows them to be true or not, it is sufficient to initiate a contest. This argument leads to this absurdity: If a man who stands in awe of the law and in fear of God makes an affidavit on information and
158 belief to initiate a contest, it will be rejected. But if a reckless man, who cares naught for the law or divinity, swears positively to the affidavit of contest, it will suffice to initiate a contest, although he does not know anything except upon information given him by others. And that this would be true even though affiant knew the rules required him to swear positively. If such be the law, then the law sets a premium upon the reckless and condemns the man who has a conscience. It may well be that the court of appeals took this into consideration and had in mind that it might properly be regarded as false swearing for a man to swear positively he knew a thing, when he only knew it on information and belief, although it might not constitute perjury. If, however, a man is conscious, when giving his testimony, that he does not know anything about the matter to which he is testifying, he ought to be regarded as swearing falsely. (People v. Von Tiedeman, 120 Cal. 128, p. 136.) It is also probable that the court of appeals considered that since the department required a man to swear to a thing positively, that if he swore to it positively when he only knew it upon information derived from others, then he would be perpetrating a fraud, because he would have misled the department.

The attorney for the defendant also argues that it made no difference whether the affidavit of contest was sufficient because the con-

testee appeared and the land office decided the matter. Land
159 office decisions were cited to the effect that the land office had a right to proceed to hear a contest, notwithstanding the affidavit of contest was insufficient and notwithstanding the contestant may have abandoned the matter. That upon the serving of the notice of contest the land office acquired jurisdiction and the department had a right to decide the case. In a court of justice it is necessary to file a declaration, complaint, or other document sufficient to give the court jurisdiction, and if a document is not filed which is sufficient to initiate the proceedings, all subsequent acts of the court are futile and nugatory and no rights whatever are adjudicated. The question arises did the court of appeals have in mind this principle of law when it made the statement above quoted? The statement in the opinion would have no useful purpose unless the court was of the opinion that there was no contest and the acts of the land department were without jurisdiction. Otherwise, the court should have ignored this allegation in the complaint or should have simply stated that it made no difference, that the land office had decided it anyhow. This would have been in line with the argument of the defendant. In this connection it must be borne in mind that the complaint stated that the land department decided the question against the plaintiff, although this fact is not referred to in the decision of the court of appeals.

The attorney for the defendant asserts that notwithstanding there was no contest, it could not make any difference. But it does
160 make a difference. If there was no contest, the defendant never acquired any preference right of entry, and that fact has an important bearing throughout this case. It also has a bearing on the interpretation to be given to the decision of the land department.

The court of appeals points out (page 569) that even though there was a contest, the defendant Bodkin could not have obtained any preference right. This is set out very clearly in paragraph 9 of the syllabus, which is as follows:

'Any right under regulation 7 of June 6, 1905, issued by the Secretary of the Interior under Reclamation Act June 17, 1902, Sec. 10, which a successful contestant of a homestead entry on land withdrawn as susceptible of irrigation might have had, was lost by the promulgation of regulation 6 of January 19, 1909, declaring that, where a contest has been allowed prior to a first form withdrawal, the withdrawal, if made before the termination of the contest or entry of the successful contestant, will terminate all rights acquired by such contest, where the land, before termination of the contest or entry by contestant, was withdrawn under the first form for irrigation works, and the contestant had only a preference.'

We will, therefore, proceed to consider the case without regard to the rights of Bodkin, for under the decision of the court of appeals, he had no rights to be considered.

161 Counsel for the defendant states that section 5 of the Act of June 27, 1906, does not apply to homestead entries and that the decision of the court of appeals wherein the court decided that it was not necessary for the plaintiff to make improvements upon the land was erroneous. It is true that that section does not refer to homestead entries but section 3 of the Act of June 17, 1902, does refer to homestead entries made after withdrawal of the land, and expressly allows a homestead entry after withdrawal. It is provided by section 3:

'That all lands entered and entries made under the homestead laws within areas so withdrawn during which withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act;' etc.

Section 3 of the Act of June 17, 1902, and section 5 of the Act of June 27, 1906, construed together work out the proposition stated by the court. In any event the court of appeals has settled the law of this case, and this court must follow the decisions upon that subject. The opinion of the land department shows that the plaintiff was residing upon the land and making improvements thereon at the time the alleged contest was heard in the land office. In this respect the court of appeals said:

'We assume that the act of June 27, 1906, was overlooked,
162 or its meaning misunderstood, when the officers of the Land Department held that the plaintiff had abandoned his homestead entry while he was in fact residing upon the land and holding it, pending a final determination of the Secretary of the Interior as to whether or not the land would be required for irrigation works under the first form of withdrawal. This was clearly a mistake of law, and authorizes a review of the proceedings in a court of equity.'

The attorney of the defendant claims that the decision of the land department, notwithstanding there was no contest, is binding, for the land department had jurisdiction and could decide the matters it did decide. In the case of Lee v. Johnson, 116 U. S. 48, p. 52, it is said:

'If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding.'

The point at issue in that case to which the Supreme Court was addressing its remarks was the decision of the land department to the effect that the party there was not acting in good faith, within the meaning of section 2262 of the Revised Statutes, in that, he was seeking to acquire a homestead for someone else instead of
163 himself. The statute provides that a homesteader must make oath, 'that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to

his own exclusive use;' etc. There is no evidence at all in this case that the plaintiff was seeking this property for another person than himself. The court takes it that where a tribunal has jurisdiction to investigate a matter and reaches the conclusion that the party is seeking to practice a fraud upon the government, that such determination of the department is binding. It certainly is required, however, that the tribunal, making the investigation, must have some jurisdiction to do so. It would be against public policy to practice a fraud upon the government. In the case of Lee v. Johnson, above referred to, it said on page 52:

'While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions.'

And the exceptions to which the court refers are stated in the previous quotation. Of course, no court will enforce a contract or an alleged right of a party where the party is seeking to perpetrate a fraud upon the government. The land department, un-
164 doubtedly, has a right to cancel an entry, where upon a contest, even though prosecuted only on behalf of the government, it appears that the entryman has violated the law.

Then we must consider what did the land department decide? It must be borne in mind that the court of appeals in this case has decided, that the plaintiff did not have to make improvements upon the land. If the land office meant by stating that the plaintiff did not act in good faith, in that, he did not make improvements and reclaim the land as required by law, then the opinion of the court of appeals is to the effect that he did not have to comply with the homestead law in this regard during the time of withdrawal.

The Secretary of the Interior in his decision says that the plaintiff,

'From his own testimony, it clearly appears that he failed to comply with the law in the matter of residence. Indeed, his actual home was in another county, where he qualified as a voter by swearing that he resided there. He states that he visited the land about every six months, staying only a few days at a time. He had no house to live in. In fact, he had no house completed at date of hearing, more than six years after entry. "He evidently did considerable work on the land, in cultivating, digging brush, etc.: but this work was after he had personal knowledge that the contest had been filed. He seems to think it a great wrong and injustice that another
165 may reap the benefit of his labors. The Department, under the plain facts in the case, especially the facts as shown from claimant's own frank testimony, is powerless to give relief.'

What the Secretary of the Interior stated would not constitute a fraud. The land was withdrawn under the reclamation act; the plaintiff did not have to cultivate or improve the same during the time of withdrawal. There is no finding of the exact time when he was away from the land. The statement of the Secretary of the

Interior shows that the plaintiff was acting in good faith, in that, he made his disclosures, believing, undoubtedly, that he — a right to do what he did do. The Secretary says, 'His testimony is quite frank, and bears the stamp of truth.'

The next question is did the plaintiff comply with the law? The allegations of the complaint as stated by the court of appeals are to the effect that the plaintiff complied with all the requirements of the homestead and reclamation laws, made final proof of such compliance before the United States Land Office for the land district, proved such compliance by two creditable witnesses, who made oath to all the items required by law to be made, paid all the fees required by law to be paid prior to receiving a patent for the land, published in due form notice to all person- having or claiming to have a better right to such land than the plaintiff, and required such persons
166 to appear and exhibit such claim of right. No person appeared at the time and place and offered evidence of a better or of any right adverse to plaintiff; nor was notice ever given to plaintiff by the land office that the proof submitted was defective in any way as to the special or any of the conditions under which the entry was made. But the Land Department, without regard to the premises, refused to consider such proof and to issue a patent for the land described.

The final proof submitted to the land department sustains this allegation of the complaint, and, therefore, shows the finding of the Secretary of the Interior, that the plaintiff did not comply with the law, to be an incorrect decision on the undisputed facts.

The conclusions must be drawn; That there was no contest; that the defendant never acquired any rights in the property; that the plaintiff submitted final proof, showing his compliance with the homestead and reclamation laws, which the department did not consider. The decision of the Circuit Court of Appeals is to the effect that the land department should have considered it, and, if considered, necessarily, the patent would have gone to the plaintiff.

The motion for rehearing will be denied.

Dated July 24th, 1919.

TRIPPET,
Judge.

167 (NOTE.—On the oral argument for rehearing, the court thought that probably there was not sufficient attention paid to the proof concerning the matters arising in the land office, but after due consideration, the court is of the opinion that upon the trial of the case, the defendant did the proper thing in laying greater stress upon the judgments introduced in evidence.)"

To all of which acts in the Court exception was duly made by the defendant.

168 "In the District Court of the United States, Southern District of California (Southern Division).

No. C-55, Equity.

WILLIAM B. EDWARDS, Plaintiff,

vs.

PATRICK H. BODKIN, Defendant.

Order Allowing Appeal.

On motion of Duke Stone and Dan V. Noland, Esqs., solicitors and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits stipulations and all stipulations and proceedings be forthwith transmitted to said United States Circuit Court of Appeals. It is further ordered that the bond on appeal be fixed at the sum of $4,000.00, the same to act as a supersedeas bond for the period of one year from date and also as a bond for costs and damages on appeal.

Dated this 8th day of Sept. 1919.

TRIPPETT,
Judge."

169 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Duke Stone and Dan V. Noland for Appellant, Patrick H. Loughran of Counsel;
Henry M. Willis for Appellee.

Before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

(*Opinion U. S. Circuit Court of Appeals.*)

WOLVERTON, *District Judge:*

This is the second appeal. The first was by Edwards, complaining that the District Court erred in sustaining a motion to dismiss his bill of complaint. 249 Fed. 562. The bill is voluminous, setting

forth with much detail what was done in the Land Department affecting plaintiff's alleged rights, so that this court had before it practically the whole case. Although the facts were not proved, they were taken to be truly alleged for the purposes of the motion. Three principal questions were determined, which, if the conclusions reached by the court are to be adhered to, are decisive of the present controversy. They are:

(1) That the land department erred in matter of law in holding that the plaintiff had abandoned his homestead
170 entry, while in fact he was residing upon the land and holding it pending a final determination by the Secretary of the Interior as to whether or not the land would be required for irrigation works under the first form of withdrawal. It is unnecessary to restate the reasoning of the court which induced the result.

(2) That the defendant acquired no preferential right by the proceedings had by reason of the lack of authority in the Commissioner of the General Land Office to promulgate the rule under which the right is claimed. But, says the court, "if it should be conceded that defendant did obtain a preferential right to enter the land while the land was completely withdrawn from entry under the first form, it was a right which, based upon a regulation, might be terminated by the Secretary of the Interior before entry, and in our opinion was so terminated by the regulations of January 19, 1909."

(3) Assuming that the defendant was permitted to substitute his scrip location under a claim of a preferred right, and that such scrip was issued under the law and regulation relating to soldier's additional homestead right, it was held that plaintiff was entitled to his homestead, under the regulations of the Land Department, for equitable reasons. Those reasons are fully stated in the opinion of the court.

A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated, including the supposition of this court relative to use made of the soldier's additional homestead scrip by Bodkin in securing his entry of the land in the Land Department.

171 It is a rule of law no longer to be controverted in the Federal courts, that whatever has been decided upon one appeal cannot be re-examined in a subsequent appeal of the same suit or action. Thus far the determinations upon the first appeal become the law of the case, and res judicata, and thenceforth cannot again be questioned in the same cause by the parties to the suit or their privies. Supervisors vs. Kennicott, 94 U. S. 498; Clark v. Keith, 106 U. S. 464; Mathews v. Columbia Nat. Bank of Tacoma, 100 Fed. 393; Guarantee Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 174; Mutual Reserve Fund Life Ass'n v. Ferrenbach, 144 Fed. 342.

Applying the rule here, and seeing that the subsequent proceeding presents no additional question material to the issues, the former decision of this court is decisive of the case upon this appeal.

There is much testimony in the record that is concededly irrelevant and immaterial, much that is incompetent as well, but its admission by the trial court over objections and exceptions affords no ground in a cause in equity for reversal. The Court of Appeals gives consideration only to such as is competent and material to the issues joined.

Finding no error, the decree of the trial court will be affirmed.

[Endorsed:] Opinion. Filed May 18, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

172 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Decree.

Appeal from the Southern Division of the District Court of the United States for the Southern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Southern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed:] No. 3428. United States Circuit Court of Appeals for the Ninth Circuit. Patrick H. Bodkin vs. William B. Edwards. Decree. Filed and Entered May 18, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

173 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Petition for Appeal to Supreme Court of the United States.

And now comes the above appellant, to wit, Patrick H. Bodkin, by his counsel, and feeling himself aggrieved by the final decree of this Court entered on the 18th day of May, 1920, affirming the decree below filed in the case on the 18th day of April, 1919, hereby prays that an appeal may be allowed him from the said decree of the Circuit Court of Appeals of the Ninth Circuit to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith.

Petitioner further prays that a Citation issue as provided by law, and that a transcript of the record of such of the proceedings and documents upon which said decree was based, as set out in the praecipe herewith, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, under the rules of said Court in such cases made and provided.

And petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

(Sgd.) DAN V. NOLAND.
(Sgd.) PATRICK H. LOUGHRAN.

174 Appeal allowed upon giving bond as required by law in the sum of $12,000.00. I certify that the matter in controversy herein as shown by the records, exceeds in value Three Thousand Dollars, exclusive of interest and costs.

(Sgd.) ERSKINE M. ROSS,
Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

E. M. R.

Dated this 10th day of July, 1920.

Receipt of Copy of the within Petition and Order for Appeal is acknowledged this 12th day of July, 1920.

(Sgd.) HENRY M. WILLIS.

[Endorsed:] Petition for and Order Allowing Appeal to Supreme Court of the United States and fixing amount of bond. Filed July 14, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

175 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Assignment of Errors on Appeal to Supreme Court of the United States.

Comes now the above named appellant, Patrick H. Bodkin, by his counsel, and in connection with his petition for appeal says that, in the record, proceedings and in the final decree of this Court, manifest error has intervened to the prejudice of the appellant, to wit:

1. The Court erred in holding that the Land Department erred in matter of law in finding and deciding that the appellee had abandoned his homestead entry.

2. The Court erred in holding that appellant had not acquired a preference right of entry under the act of May 14, 1880 (21 Stat. 140) by virtue of the final judgment rendered by the Land Department in and on appellant's contest against appellee's homestead entry.

3. The Court erred in holding that the regulations of the Department of the Interior of January 19, 1909 (37 Land Decisions, 365), terminated any and all right- appellant had acquired by and under his contest against appellee's homestead entry.

4. The Court erred in holding that the appellee was entitled to his homestead entry and the lands covered thereby, for equitable reasons, despite and notwithstanding the contest initiated against said entry by the appellant and the findings of fact and con-
176 clusions of law set out in the decisions and judgments of the Land Department under such contest.

5. The Court erred in assuming, contrary to the explicit showing the record before it presented, that appellant exercised the preference right of entry awarded to him through the decisions of the Land Department by locating assignable soldiers' additional homestead rights upon the lands involved in the litigation, the record showing that appellant exercised such preference right by making a homestead entry of the land on June 1, 1912.

6. The Court erred in failing to perceive among the admitted facts in the litigation the fact that, in enjoyment of his preference right of entry, the appellant filed his homestead application on May 18, 1910; that such application was finally accepted and entry there-

under allowed on June 1, 1912 and that it was not until March 6, 1914, that the appellant located the assignable soldiers' additional homestead rights on the land, doing so contemporaneously with the relinquishment of his homestead entry.

7. The Court erred in affirming the decree of the Court below granting the prayers of appellee's bill.

8. The decree is contrary to law.

Wherefore appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed.

(Sgd.) DAN V. NOLAND,
(Sgd.) PATRICK H. LOUGHRAN,
Attorneys for Appellant.

Received copy of the within assignment of errors this 12th day of July, 1920.

(Sgd.) HENRY M. WILLIS.
Attorney for Plaintiff and Appellee.

[Endorsed:] Assignment of Errors on Appeal to Supreme Court of the United States. Filed July 14, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

177 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

WILLIAM B. EDWARDS, Plaintiff,

vs.

PATRICK H. BODKIN, Defendant.

Bond on Appeal.

Know all men by these presents, that we Patrick H. Bodkin, as principal, and Hattie Johnson, by occupation rancher, residing at Los Angeles in the Southern District of California, and Carrie Johnson, by occupation housewife, residing at Los Angeles in the Southern District of California and Charles E. Olive, by occupation rancher, residing at Blythe in the Southern District of California, and Bella E. Bodkin, by occupation housewife, residing at Blythe in the Southern District of California, and — by occupation — residing at —— in the Southern District of California, as cureties, are held and firmly bound unto William B. Edwards in the sum of Twelve Thousand ($12,000.00) dollars, lawful money of the United States, to be paid to him and his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, severally, and each of our heirs, executors and administrators, by these presents in the amounts set opposite

our respective names hereunto signed. We, and each of us does, hereby consent that in case of default or contumacy on the part of the principal or sureties, execution to the amount hereinafter set opposite our respective names may issue against the goods, chattels, and land belonging to us respectively.

178 Sealed with our seals and dated this 23d day of July, 1920.

Whereas the above named Patrick H. Bodkin, has petitioned for an appeal to the Supreme Court of the United States from a decision of the United States Circuit Court of Appeals for the Ninth Circuit entered the 18th day of May, 1920, in the above-entitled cause affirming a decision of the District Court of the United States, Southern District of California, Southern Division, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named, Patrick H. Bodkin, shall prosecute his appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

	Name. Amount.
(Sgd.)	HATTIE JOHNSON, Twelve Thousand.
(Sgd.)	CARRIE JOHNSON, Four Thousand.
(Sgd.)	CHAS. E. OLIVER, Seven Thousand.
(Sgd.)	BELLA E. BODKIN, One Thousand.

(Sgd.) PATRICK H. BODKIN,
Principal.

179 STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 23 day of July, 1920, personally appeared before me Hattie Johnson, Carrie Johnson, Chas. E. Oliver, and Bella E. Bodkin known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and acknowledged that they executed the same as their free act and deed for the purposes therein set forth.

And the said Hattie Johnson, Carrie Johnson, Chas. E. Oliver and Bella E. Bodkin being by me duly sworn, each for himself says that he is a resident and householder in said Southern District of California, and that he is worth double the amount named in the foregoing instrument, over and above all his debts and liabilities in property exempt from execution.

(Sgd.) HATTIE JOHNSON.
(Sgd.) CARRIE JOHNSON.
(Sgd.) CHAS. E. OLIVER.
(Sgd.) BELLA E. BODKIN.

Subscribed and sworn to before me this 23 day of July, A. D. 1920.

[SEAL.] (Sgd.) ANDREW REUTER,
Notary Public in and for the County of Los Angeles, State of California.

The within bond is approved both as to sufficiency and form this 23 day of July, 1920.

(Sgd.) ROSS,
Circuit Judge.

[Endorsed:] No. 3428. United States Circuit Court of Appeals for the Ninth Circuit. William B. Edwards, Plaintiff, vs. Patrick H. Bodkin, Defendant. Bond on Appeal. Filed July 24, 1920. F. D. Monckton, Clerk.

180 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Designation of Record on Appeal to Supreme Court of the United States.

To the clerk of said court:

The appellant hereby requests the following be printed as a sufficient and complete record on which to submit the cause on the hearing thereof in the Supreme Court of the United States, and elects to have the record in said cause printed by and under the supervision of the Clerk of the said Supreme Court under the rules thereof. The parts of the record deemed necessary to print are the following:

I. Amended bill of Complaint.

II. Answer of the defendant.

Those portions of the printed transcript of record as filed in this Court on appeal from the District Court which are specifically described as follows:

III. The agreed facts as they are set out at pages 62 to 128 of such transcript, down to paragraph 23 at said page 128.

IV. Decision of First Assistant Secretary of the Interior Jones of August 21, 1913 and certificate thereto of Frank Buren, Register, as set out at pp. 245 to 248 of such transcript.

V. Decision of the Department of the Interior of October 2, 1913 and certificate thereto of Frank Buren, Register, as set out at pp. 252 and 253 of such transcript.

181 VI. Conclusions of United States District Court Judge Oscar A. Trippet as set out at pp. 272 to 276 of such transcript, and the decree in pursuance thereof at pp. 277, 278, 278 down to paragraph 36 at p. 280.

VII. Decree of said District Court signed by said District Judge as set out at pp. 277 to 279, and down to paragraph 36 at p. 280 of such transcript.

VIII. The conclusions of United States District Court Judge Trippet on the petition for rehearing, as set out at pp. 299 to 310 and down to paragraph 38 at p. 311 of such transcript.

IX. Order of Judge Trippet allowing appeal as set out at p. 317 of such transcript.

X. Opinion of this Circuit Court of Appeals.

XI. Decree of this Circuit Court of Appeals.

XII. Motion for appeal and order allowing same.

XIII. Assignment of Errors.

XIV. Bond on Appeal as same may hereafter be approved by the Court or a Justice.

XV. Citation to appellee to appear in Supreme Court.

XVI. This Designation of Parts of Record in this Court for Printing of Record in Supreme Court of the United States.

XVII. Clerk's Certificate as to transcript.

Dated this 10th day of July, 1920.

(Sgd.) DAN V. NOLAND.
(Sgd.) PATRICK H. LOUGHRAN.

Receipt of copy of the within præcipe is hereby acknowledged this 12th day of July, 1920.

(Sgd.) HENRY M. WILLIS.

[Endorsed:] Designation of Record on Appeal to Supreme Court of the United States. Filed July 14, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

182 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Præcipe for Additional Record.

Designation of Additional Record on Appeal to the Supreme Court of the United States.

To the clerk of said court:

The appellee hereby requests that the following portions of the printed transcript of record, as filed in this court on appeal from the District Court, be printed in the record on appeal to the Supreme Court of the United States, in addition to those portions designated by Appellant in his designation dated July 10, 1920, to wit:

In addition to the portion of the record designated in Paragraph III of Appellant's designation, print that portion of said printed record, as filed, and therein referred to, as follows:

1. Beginning with Paragraph 28, on page 132, and ending at page 133, down to Paragraph 29.

2. Beginning with Paragraph 31 on Page 209, and ending at page 221, down to Paragraph 32.

Dated July 14, 1920.

(Sgd.) HENRY M. WILLIS,
Attorney for Appellee.

Received Copy of the Within this 14 day of July, 1920.

(Sgd.) DAN V. NOLAND,
By D. S.,
Attorney for Appellant.

[Endorsed:] Præcipe of Appellee for Additional Record. Filed July 15, 1920. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

183 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3428.

PATRICK H. BODKIN, Appellant,

vs.

WILLIAM B. EDWARDS, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-two (182) pages, numbered from and including 1 to and including 182, to be a true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to designations of counsel for the respective parties filed, respectively, July 14, 1920, and July 15, 1920.

I further certify that the cost of the Transcript of Record amounts to the sum of One Hundred and Ten Dollars ($110.00) and has been paid by the appellant.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of August, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

184 UNITED STATES OF AMERICA, *ss:*

To William B. Edwards, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Patrick H. Bodkin is the appellant and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Erskine M. Ross Justice United States Circuit Court of Appeals for the Ninth Circuit, this 10th day of July, in the year of our Lord One Thousand Nine Hundred and Twenty.

ERSKINE M. ROSS,
Judge of the U. S. Circuit Court of Appeals for the 9th Circuit.

185 [Endorsed:] No. 3428. Patrick H. Bodkin, Appellant, vs. Wm. B. Edwards, Appellee. Citation to appear at Supreme Court of United States. Receipt of copy of the within citation is hereby acknowledged this 12" day of July, 1920. Henry M. Willis, Attorney for Plaintiff, Appellee. Filed July 14, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Patrick H. Loughran, Attoney-at-Law, Mills Building, Washington, D. C.

Endorsed on cover: File No. 27,852, U. S. Circuit Court Appeals, 9th Circuit. Term No. 495. Patrick H. Bodkin, appellant, vs. William B. Edwards. Filed August 18th, 1920. File No. 27,852.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN,
Appellant and Petitioner,
v.
WILLIAM B. EDWARDS,

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for the Petitioner for Rehearing.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Decisions Heretofore in the Case.

Land Department Rejects Court of Appeals Views.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN,
Appellant and Petitioner,

v.

WILLIAM B. EDWARDS,

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the appellant in No. 495, Bodkin vs. Edwards, an appeal from the Circuit Court of Appeals for the Ninth Circuit, hereby respectfully, earnestly and sincerely prays that this Honorable

Court will again examine the record in said case and reconsider the matter of a final decision therein.

THE "LAW OF THE CASE" DOCTRINE PREVENTED FREEDOM OF JUDGMENT BY THE DISTRICT COURT AS TO THE MATERIALITY OF ALLEGATIONS IN THE BILL OF COMPLAINT AND OF THE TESTIMONY TAKEN IN THE CAUSE.

Anyone truly familiar with this case may deduce the pith of the contents of this petition from the titles of the chapters thereof. (See Index.)

Five decisions were rendered below. Only two of them, however, were free and independent expressions of views on the law *and, consequently, also on the matter of materiality of allegations and testimony.* Those two free-minded utterances were the decision of District Judge Bledsoe, who held that the land department had accurately construed and enforced all pertinent law and, therefore, *that the allegations of the bill were utterly immaterial,* and the subsequent decision of Circuit Judge Morrow who, in reversing Judge Bledsoe, construed two public land statutes in a manner openly and emphatically at variance with fifteen years of practice and decision in the land department, condemned one set of administrative regulations as invalid, adjudged to be violative of law a rule of practice in said department as to contest proceedings against public land entries, *declared that the allegations of the bill were plainly material,* and, of course, thereby settled "the law of the case" in all the courts below.

The contents of the assignment of errors on the appeal were neither discussed generally in this court's opinion of February 28, 1921, nor was any specific error alleged therein even mentioned in said opinion. It is believed that had the very first of the errors assigned been considered fully in connection with the rulings made by Circuit Judge Morrow, with which rulings it must be presumed that the Court is familiar, as in its opinion it cites 249 Fed. 562, it would have been apprehended that among the questions *duly* presented here was the one whether Circuit Judge Morrow was altogether, or at all, correct in saying that the land department's findings of fact in the contest proceedings which is set out in the record of this case were *immaterial, because, in contemplation of law, there had been no contest proceeding and no entry canceled in such proceeding.*

Circuit Judge Morrow's view, although long and thoroughly known to the land department, have been rejected by that department (Wells v. Fisher, 47 L. D. 288), and will undoubtedly remain rejected by it until this Court, by a final announcement adhering to its opinion of February 28, 1921, shall clearly and unmistakably indicate that it approves and concurs in the views of the Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562. For at this time the belief seems prevalent that *this Court was not apprized when it announced its opinion of February 28, 1921, that there was dissent and disagreement between the District Court and the Court of Appeals on controlling matters of law, and that not in any juridical, nor logical, nor any acceptable sense, was there a concurrence between them in matters of fact which each court had adjudged material.*

The decision of this Court of February 28, 1921 was rendered on a motion to dismiss or affirm. Owing to considerations which are set out hereinafter, counsel for appellee was persuaded to believe that such motion should not be answered, and, therefore, no answer thereto was made.

No brief on the merits had been filed on behalf of either party at time of rendition of this Court's decision. It follows that said decision was rendered in the absence of any representations whatsoever to the Court on behalf of the appellant, who was forced into litigation which produced five decisions below, three in the District Court, one of which was on rehearing, and two in the Court of Appeals. All that litigation was started by a man who maintained his suit in *forma pauperis* and took advantage of every opportunity to increase the expenses of his adversary by injecting into the record in the courts below much obviously immaterial matter.

May we suggest that this Court possibly was not advised that while the appellant was seeking redress for grievous wrongs done him by the courts below, that he was also, in fact, defending in this Court the Department of the Interior of the United States and seeking vindication at the hands of this Court of that department's rather emphatic refusal to follow the views expressed by the Court of Appeals in 249 Fed. 562. See Wells vs. Fisher, 47 L. D. 288, wherein the Department of the Interior adheres to those construction of statutes and those administrative regulations which were condemned as violative of law and invalid in the opinion of the Court of Appeals in the instant case.

The said decision of this Court, as we very respect-

fully and confidently submit, is clearly shown in the discussion thereof hereinafter to have been based upon the misconception that the District Court and the Circuit Court of Appeals had CONCURRED in adjudging that certain of the allegations in the bill of complaint, as well as the scant amount of testimony that came from two witnesses in the District Court, were material and controlling in the litigation. It was due entirely to such misconception—a misconception which the badly arranged record in this case was likely to produce—that this Court held that "the case as presented here turns essentially on questions of fact" and, therefore, that it is classifiable among cases of the character which "under a settled rule" this Court will not review.

It would be offensive to make the observations which are set out in the next paragraph hereof, if we were not making them simply for purposes of elucidation of the propositions we are endeavoring to persuade this Court to accept and approve.

If this case were in this Court on an appeal from a Court of Appeals decision reversing a District Court because of alleged error with respect to the *materiality* of allegations in a bill of complaint, of course this Court would not say, as it said in its decision of February 28, 1921, "that both courts below on a review of the evidence have found the facts in the same way." *But there is absolutely no essential difference between such hypothetical case and the instant case, as we will proceed to demonstrate.*

The District Court, in sustaining a motion to dismiss the bill of complaint (241 Fed. 931), held and ruled that none of the allegations of fact in the bill of complaint possessed the merit of materiality. *That ruling*

settled "the law of the case" in the District Court, of course.

When the case went to the Court of Appeals (249 Fed. 562), that court, after ruling (a) that the land department had misconstrued one act of Congress for over a generation, (b) that said department had "overlooked" or "misunderstood" another act of Congress for a period of ten years, and (c) that said department's long-established regulations and decisions were clearly violative of statute and destructive of the rights of citizens, declared that the District Court's views as to the materiality of allegations in the bill of complaint were wholly erroneous. Manifestly they were erroneous, if the District Court had failed utterly to perceive what the Court of Appeals asserted was true, viz., that the land department, for about fifteen years, had been despoiling American citizens through gross misconstructions of acts of Congress relating to the public lands.

The ruling of the Court of Appeals in reversal of the District Court not only *settled "the law of the case" for that court but for the Court of Appeals as well.* Hence it came about that the District Court was powerless—as in effect it said it was—to do aught else in and by its second decision (R. 78 to 83, 267 Fed. 1004) than to obey and effectuate the law as to materiality as it had been expounded and defined by the Court of Appeals. *It goes without saying that the District Court could not thereafter, as it had done theretofore, announce views on materiality with freedom of expressed thought and judgment.*

Now inasmuch as only those allegations of fact which the District Court had adjudged *immaterial* in its first decision (241 Fed. 931), were the identical alle-

gations of fact which were brought before it for a second decision in pursuance of the "law of the case as settled by the Court of Appeals, *does it not follow that when the District Court in its second decision (R. 78 to 83, 267 Fed. 1004) declared these allegations of fact, and the proof offered in support thereof, sufficient in law to warrant a decree granting the prayers of the bill, it acted wholly under compulsion, patently against its own judgment as previously announced, in faithful obedience to "the law of the case" doctrine, and not at all in true concurrence with the Appellate Court, but, on the contrary, as a mere instrument to put into effect the directions of the Appellate Court?*

If what we have said hereinbefore be true and be logical why, we ask, is it not a legal consequence thereof that No. 495 came into this court with the District Court and the Court of Appeals entertaining and expressing divergent and irreconcilable views on the materiality of questions of fact?

What could be more obviously the opposite of concurrence in matters of fact than that the District Court and the Court of Appeals differed and dissented from each other on the matter of materiality of the allegations in the bill of complaint?

The judgment of this Court was doubtless considerably, if not entirely, influenced by the statement in the *second* Court of Appeals decision, announced by District Judge Wolverton (R. 84 to 86, 265 Fed. 621) that "a careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated, including the supposition of this Court relative to use made of the soldiers' additional homestead scrip by Bodkin in securing his entry of the land in the Land Department."

The first Court of Appeals opinion (249 Fed. 562) was described and declared in the second opinion of the same court (R. 84 and 85, 265 Fed. 621), announced by District Judge Wolverton, as well as in the second opinion of the District Court, which was rendered by Judge Trippett (R. 78, 81, 267 Fed., 1004), *as having definitely and finally stated and settled the law in this particular case.* Obviously, therefore, we must turn to the *first* Court of Appeals opinion for an insight, *which it alone can afford,* as to what allegations in the bill of complaint were adjusted material in *the decision which settled the law in this particular case for the two courts below.*

Whether an allegation is material necessarily calls for a ruling in law. In Judge Bledsoe's opinion (241 Fed. 931), it was held by him, in sustaining the motion to dismiss the bill of complaint, that none of the allegations therein possessed materiality. Thereafter the Court of Appeals, differing from Judge Bledsoe, declared that many, if not all, of the said allegations were material. Therefore, when the case was again heard in the District Court, subsequent to rendition of the first decision by the Court of Appeals, Judge Trippett, who then presided in the District Court, was constrained by reason of the first Court of Appeals opinion to rule and hold as being material any allegation made in the bill of complaint, or any testimony pertinent under any such allegation, which should be deemed to possess materiality under the views which were expressed by the Appellate Court in 249 Fed. 562. As a matter of record fact Judge Trippett stated in his opinion (R. 81, 267 Fed. 1004) that "in any event the Court of Appeals has settled the law of this case." District Judge Wolverton, in announcing the

second opinion of the Appellate Court, expressly stated that he and it were constrained to rule and hold as to materiality in strict accordance with the views on materiality expressed in the first opinion of that court. Judge Wolverton expressed himself thus:

> "It is a rule of law no longer to be controverted in the Federal Courts, that whatever has been decided upon one appeal cannot be re-examined in a subsequent appeal of the same suit or action." (265 Fed., 621.)

From the foregoing it is unmistakably evident that after rendition of the *first* Court of Appeals decision, all judges below (whether in the District Court or the Appellate Court) were *bound* by "the law of the case" doctrine to rule as to materiality as was ruled in said *first* Appellate Court decision. *It is an inescapable deduction from these circumstances that it is impossible to say that two courts below CONCURRED that all material allegations of the complaint had been substantiated. We submit, therefore, that in this Court, and on the appeal in this case, there should have been, and that the appellant was entitled to, an opinion as to whether the Court of Appeals did or did not in its first decision (249 Fed. 562), wrong the appellant in this Court by what said Circuit Court of Appeals conceived to be and adjudged to be "the law of the case."*

While this Court observed that the record "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included," it is respectfully submitted that the record does contain

every item of and all of the evidence in the courts below which either court deemed in anywise even pertinent under the allegations of the bill of complaint. *In other words, we are positive and certain that the record contains entirely all the evidence ever adduced in the proceeding which took on the character of materiality under those rulings in matters of law which were made in the first decision of the Court of Appeals fixing and settling "the law of the case." Certain it is that if those rulings in matters of law are sound, there is plainly in the record all and everything essential to support the conclusions announced below. However, should this Court nevertheless desire that the entire record made in the Court of Appeals, upon the second decision therein, be printed and filed here, action will be taken accordingly on the slightest intimation to us of such desire.*

MAY IT NOT BE SAID RESPECTFULLY THAT IF THIS COURT'S DECISION OF FEBRUARY 28, 1921, IS NOT UNDECISIVE AS TO "THE LAW OF THE CASE" IN THE COURTS BELOW, IT IS NECESSARILY A CONCURRENCE IN THE OPINION OF THE APPELLATE COURT THAT THE LAND DEPARTMENT HAS MISUNDERSTOOD THE ACT OF MAY 14, 1880, AND "OVERLOOKED" THE FIFTH SECTION OF THE ACT OF JUNE 27, 1906, IN ITS DUTY OF ADMINISTERING THE PUBLIC LANDS OF THE UNITED STATES.

Had this court stated specifically, or even described very generally and broadly, "the questions of fact" which it regarded as necessarily classifying this controversy among cases subject to a "settled rule" that

"concurrent findings" of fact below will not be reviewed in this Court, or had there been mentioned in the opinion this Court announced on February 28, 1921, only a single matter of fact which it believed had been determined below and which it further believed had been regarded by *both* courts below as controlling in the disposition of the case, or had there been said anything whatever by this Court which would indicate that it had accurately apprehended what the findings below were, or had this court said only this, viz, that the facts in proof, as found by the courts below, require, as a matter of law, a decree making the appellant here a trustee for appellee of the legal title that passed to the former under a patent issued to him by the land department, we would be very much less perplexed and embarrassed as to how we may best assist this court to perceive and concur in our contentions here, to wit:

1st. That every allegation of fact the Court of Appeals adjudged to be material took on "materiality" only through grossly erroneous constructions of two acts of Congress and through a display of unfamiliarity with the law, as frequently expounded by this Court, with respect to the scope of the discretion exercisable by the Land Department in giving effect to the salutary statute of May 14, 1880, which confers a preference *right* of entry on anyone who successfully contests and procures the cancellation of a homestead entry for any reason or upon any ground challenging observance of the law by the entryman thereunder.

2d. That it was *impossible* for "both courts below on a review of the evidence" to "have found the facts in

the same way," and that it was *impossible* for the District Court to have exercised freedom of judgment as to the facts—as to the *materiality* of the facts—when, *as the record shows and the District Court expressly said*, its views as to the facts—as to the *materiality* of the facts—were coerced by, were under compulsion from, the "law of the case" as stated in the first decision by the Court of Appeals (249 Fed. 562).

CASES NOW IN THIS COURT WHICH WERE IMMEDIATELY AFFECTED BY THE DECISION RENDERED FEBRUARY 28, 1921.

We regard it as reasonably certain that the court did not realize that an affirmance in No. 495 would be regarded by the legal profession and the public as at least a tacit or implied complete confirmation and approval of the rulings of the Court of Appeals in 249 Fed. 562. Whether such affirmance is such confirmation and approval must soon be determined by this court in Nos. 291 and 292, McLaren, administrator, v. Fleischer, and Culpepper v. Ocheltree, respectively, which are here on certiorari to the Supreme Court of the State of California, after decisions by that court on December 1, 1919, which are expressive of views perfectly the opposite of the views of the Court of Appeals in 249 Fed. 562.

The counsel for the appellee in No. 495 are also the counsel for the petitioners in Nos. 291 and 292. Notwithstanding this identity of counsel in the said three cases, the motion to dismiss or affirm in No. 495 contained not the slightest reference to Nos. 291 and 292. But in the petition for the writs in those two cases reliance was made, in the main, upon the stated ground—

> "that the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy, under the act of May 14, 1880 (21 Stat. 141), which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. Rep. 562, 568. The latter case involved land in the near vicinity of that here in controversy, and hence this Honorable Court should take action to bring about a uniformity of decisions." (pp. 2 and 4 of the petition for *certiorari* in No. 291.)

A motion to advance in Nos. 291 and 292, if made, might have been granted by this Court. Certainly if this Court had been informed in a motion to advance said cases that No. 495 was a case identical in all its legal aspects and, as is true, that since rendition of the decision in 249 Fed. 562, and encouraged thereby, numerous similar suits have been filed and are in contemplation because of the opinion of the Court of Appeals to the effect that the Land Department has been issuing patents to some in derogation of the rights of others for over fifteen years, it is impossible to doubt that there would have been serious consideration of such suggestion to advance.

But for reasons best known to counsel on the other side in Nos. 291, 292 and 495 it was deemed promotive of their expressed desire "to bring about a uniformity of decisions" to seek to have affirmed, under a motion to dismiss or affirm in No. 495, that decision of the Court of Appeals that unsettles the titles taken by many unoffending citizens of the United States in implicit

reliance upon the soundness in law of regulations and decisions of the Land Department which have obtained over a period of fifteen years.

A motion to advance Nos. 291 and 292 has been filed in this Court on behalf of the respondents in Nos. 291 and 292. And this court is hereby most respectfully urged to consider this petition for rehearing in No. 495 in conjunction with the motion to advance Nos. 291 and 292. If the petition here and such motion in Nos. 291 and 292 are granted, it is suggested in the interest of private right, in the interest of the public doing business before the Land Department and out of a wish that the rulings of the Land Department be promptly vindicated, or made to conform to law, that all three cases be argued at approximately the same time. The motion to advance sets out the results of a comparative study and analysis of the three cases.

FRIVOLOUS IN ONE RESPECT AND AS TO ALL OTHERS EVINCING A LACK OF UNDERSTANDING OF THIS COURT'S DECISIONS, WAS THE MOTION TO ADVANCE OR AFFIRM.

Petitioner begs leave to advise the Court as to the reasons he deemed sufficient for withholding an answer to the motion to dismiss or affirm.

After consultation by counsel for the petitioner with experienced practitioners in this Court concerning the motion to dismiss or affirm, and after consideration of their unanimous opinion that the stated grounds for the motion were without merit, petitioner's counsel concluded that the inevitable action this Court would take would be to overrule, postpone consideration until hearing on the merits or transfer to a summary docket.

Neither by expression nor by implication—not even by the remotest suggestion—did said motion allude to a single valid reason for a dismissal or an affirmance. Insofar as it challenged the jurisdiction of this Court it was utterly frivolous. Insofar as it urged that a decision on all the questions of law presented in the assignment of errors in No. 495 was foreclosed by frequent decisions of this Court heretofore, it but displayed a lack of understanding of the decisions of this Court. It was doubtless as much of a surprise to opposing counsel and his client as to this petitioner and his counsel that this court declared in No. 495 that there was *concurrence* between two courts below as to the *materiality* of the allegations in the bill of complaint and as to the materiality of the scant testimony given from the witness chair.

The terms of this Court's affirmance neither approve a single contention made in the motion nor contain a reference to any one of the alleged authorities cited in the motion. In these circumstances, although we concede that a Court established by the Federal Constitution undoubtedly possesses the authority and is under the obligation to dismiss or affirm (even *sua sponte*, in some cases), it would seem to us to be higher justice to the appellant and non-prejudicial to the appellee, in instances where there is apparent sincerity in the prosecution of the appeal and the incurrence of great expense by one made a defendant in a suit brought and maintained by another in *forma pauperis*, if this Court would, with respect to such motion to dismiss or affirm as was filed in this proceeding, overrule it, postpone consideration thereof until hearing on the merits, or assign the case to a summary docket.

MATERIALITY AS DETERMINED IN THE FIRST COURT OF APPEALS DECISION (249 FED. 562).

A word as to the character of the original bill. The Appellate Court observed in its first decision (249 Fed. 562, 564), that "the plaintiff is prosecuting this appeal in *forma pauperis.*" * * * "The complaint is not a model of legal composition, but is an example of the difficulty to which judicial inquiry is sometimes subjected in getting at the real merits of a case, where the relevant and material facts are not fully or succinctly and plainly stated."

After rendition of the decision in 249 Fed. 562, which concluded with the statement that District Judge Bledsoe had erred (241 Fed. 931) in sustaining the motion to dismiss the original bill upon the ground that the complaint did not state a cause of action, a colorable amendment of the complaint was made, which colorable amendment caused District Judge Trippett to remark (R. 74, 267 Fed. 1004) that "the complaint has been amended but not in any material respect as compared with the complaint passed upon by the said court" (the Appellate Court, in 249 Fed. 562).

The courts below did not find, as alleged in the scurrilous and libelous complaint filed by one who sued in *forma pauperis,* that officers of the Land Department and of the Department of Justice were *particeps criminis* in a conspiracy with the man sued, to take the land from the man suing and give it to the man sued. For such wholly unprovoked and numerous insults to such officers, for such purely malicious aspersions on their honor, see paragraphs II, V, XII, XIV, XV, XVII, XX, XXII, XXIII, XXVI,

XXXII, XXXIII and XXXIV of the bill of complaint at pages 2 to 10 of the Record.

The first District Court decision (241 Fed. 931) merely declared that the many lurid and loose charges of deliberate wrongdoing which the plaintiff made against public officers, were not set out in the complaint in a manner entitling the pleader to a finding that they were true and material, even under a demurrer thereto. *It must be said of the first decision that it adjudged all the allegations of the complaint to be immaterial.*

Doubtless deeming it but an act of simple justice to the thus maligned officials, District Judge Trippett said "the plaintiff offered no proof regarding the misconduct of any officers of the land department." (R. 74, 267 Fed. 1004.)

We submit that with no proof whatever offered as to the alleged venality of numerous government officials in several Departments, there could not possibly have remained in the complaint for decision thereon anything beyond what we here advisedly denominate *as the issues of pure law tendered in the XI and XXXIV paragraphs of the bill.* (*R. 4 and 10.*)

The first Court of Appeals decision (249 Fed. 562) is of vital importance in this discussion, *chiefly because it is the only decision in which the materiality of allegations in the complaint was actually adjudged with complete freedom of judgment thereon, and also because the land department has flatly refused to follow that decision and has exposed all its fallacies.* (*Wells v. Fisher, 74 L. D., 288.*) Such first decision was rendered notwithstanding that "no printed brief has been filed" by appellant, notwithstanding that "no specification of errors relied upon is stated, and no

citation has been issued and served upon the defendant as required by the rules of this Court," and notwithstanding that a motion to dismiss for those sundry reasons had been filed.

Such first decision does not purport to contain any finding that would require of the judiciary a holding that the cancellation of the homestead entry by the land department in the contest proceedings was procured through fraud or imposition practiced upon that department, or through corruption or bias of the officers of that department. Such decision does not purport to find any fact showing want of due process in the contest proceeding in the land department that eventuated in cancellation of the homestead entry. On the contrary, such decision remarked that "with respect to the defendants charge that the plaintiff had abandoned the entry, *we may not inquire into this as a question of fact,* although we believe it was erroneously determined, *but we may inquire into it as a question of law.*" (249 Fed. 567.) Italics supplied.

After thus acknowledging that there existed no reason for disproving the findings of fact as made by the land department in the contest proceeding, the Appellate Court, in its first opinion, *thereafter proceeded to settle the law of the case, and, therefore, to settle also the matter of materiality of allegations of the complaint.* In so doing, said court held (249 Fed. 567) that the 5th section of the act of June 27, 1906 (34 Stat. 519) rendered it legally impossible for a contest against a homestead entry of lands in a first form withdrawal under the reclamation act of June 17, 1902 (32 Stat. 388) to be initiated or maintained under a charge of abandonment. *From such holding it would follow that there was materiality in any show-*

ing that a person whose homestead entry was canceled for abandonment was, at time of abatement of the withdrawal and restoration of the land to the public domain, in occupancy of the lands that were once claimed by him under such entry.

It was also held in 249 Fed. 566, that as the "defendant in support of his contest, made oath that he did not know and had no means of knowing the facts" that, therefore, "this was insufficient to initiate a contest." *From such holding it would follow* (a) *that the land department had erred, for more than a generation, in enforcing regulations and decisions to the effect that an affidavit of contest may be executed on information and belief, if corroborated by another on personal knowledge, and* (b) *that there was materiality in any showing that in a contest proceeding in the land department the contestant admitted that he executed his affidavit on information and belief.*

It was also held in 249 Fed. 569 that "whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909" (37 L. D., 365). *From such holding it would follow that there was materiality in any showing that a person who sought to exercise a contestant's preference right subsequent to January 19, 1909, was opposed by another who was claiming the land as a settler thereon.*

It was also held in 249 Fed. 568, that to give effect to the land department's regulations of June 6, 1905 (33 L. D., 607) would be "to amend, modify, or change the act of May 14, 1880 (21 Stat. 140), under which the defendant claims his preferential right." *From such holding it would follow, of course, that there was materiality in a showing that when defendant applied*

for the land on the first day it was enterable after abatement of the withdrawal (in this case May 18, 1910), it had been settled upon by plaintiff on the first day it became subject to settlement (in this case April 18, 1910).

All the aforesaid constructions of acts of Congress and rulings on the validity of departmental decisions which the Court made in 249 Fed. 562, are emphatically repudiatory of an established practice and of a long line of decisions of the land department. However, *only one court below, and not two, exercised freedom of judgment* in construing the aforesaid acts, in condemning the aforesaid regulations and in *determining the materiality* of the allegations in the pleadings. *"The law of the case" doctrine prevented freedom of judgment* on those matters by the District Court, *and therefore it is readily understandable* that No. 495 in this Court is not a case which "as presented here turns essentially on questions of fact." Clearly evident is it that this Court was misled into believing and, in effect, expressly saying that the District Court, in the exercise of its freedom of judgment, had *concurred* with the Circuit Court of Appeals "that all material allegations of the bill of complaint have been substantiated."

MANY OF THE ALLEGED FINDINGS OF FACT BELOW ARE IMPOSSIBLE AS TRUE FINDINGS IN THE LIGHT OF THE RECORD AND OF THE LAW.

In our desire to convince this Court of the sincerity of our apology to it for displaying the bad judgment, but certainly not discourtesy to the Court, of withholding an answer to the motion to dismiss or affirm,

we set out here every utterance of the Court of Appeals (249 Fed. 562) that might be construed as a reference by it to allegations of fact it considered as being of importance. Therein, at page 556, it is stated (because so stated in the complaint and admitted under the motion to dismiss), that "thereafter (subsequent to December 1, 1902, when the appellee here made his homestead entry) plaintiff *complied with all the requirements of the homestead and reclamation laws.*" (Italics supplied.) That statement in the complaint was contrary to the facts as found in the decision of the Register and Receiver of December 31, 1908, from which we quote the following:

> "There clearly had been abandonment of the land by contestee, and there has been an utter lack of good faith shown in his relations towards his entry. *His improvements placed on the land subsequent to the date of the contest affidavit, were clearly made with knowledge of the contest.*" Italics supplied. (R. 38.)

It was contrary also to what the General Land Office found in its decision of June 25, 1909, in the contest proceeding, to-wit:

> "The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land." (R. 40.)

And it is obviously quite the opposite of the following extract from the decision of the Secretary of the In-

terior of January 6, 1910, in the contest proceeding, to-wit:

> "*From his own testimony,* it clearly appears that he failed to comply with the law in the matter of residence. Indeed his actual home was in another county, where he qualified as a voter by swearing that he resided there." * * * "He evidently did considerable work on the land, in cultivating, digging brush, etc.; *but this work was after he had personal knowledge that the contest had been filed.*" Italics supplied. (R. 42 and 43.)

Further inquiring as to allegations deemed important in the exceptional decision reported in 249 Fed. 562, we notice another statement therein which was made in the complaint and admitted under the motion to dismiss, viz., that "plaintiff" * * * "made final proof" * * * "but the land department, without regard to the premises, refused to consider such proof" (249 Fed. at 565).

Such proof was made on April 23, 1909, subsequent to the decision of the Register and Receiver in the contest proceeding (R. 44). It purported to be a proof of residence and cultivation for five years, while on its face it is not such proof nor any proof answering the law's requirements. (R. 46 to 49.) Moreover, the land department did consider such proof and did reject it, it being impossible of acceptance under any law. (R. 50 to 52.)

Continuing our search for allegations deemed important in 249 Fed. 562, we notice therein, at page 566, substantially the same observation that was made in the complaint and admitted under the demurrer, to wit,

that shortly after making homestead entry on December 1, 1902, the plaintiff, although "he established his residence on the land, * * * "was not then able or prepared, *or had no occasion to believe he would be required to reside upon and cultivate the land,*" etc.) (Italics suplied.) The receiver's receipt which issued to the plaintiff under his entry on Dec. 1, 1902, expressly informed him that residence upon and cultivation of the land were required by law. (R. 32 and 33.) Furthermore the public was informed to the same effect in and by several publications of the land department, to-wit: Circular of March 31, 1904, 32 L. D., 538; paragraphs 6 and 11 thereof; Instructions of May 17, 1904, 32 L. D., 633, 634; Circular letter, 33 L. D. 38; Cornelius J. McNamara, 33 L. D., 521, 525 and Jacob Fist, 33 L. D., 257, 259.

Still pursuing allegations deemed material in 249 Fed. 562, we discover at pages 566 and 567 of the report this statement which, of course, merely reflects what was set out in the bill of complaint, to wit:

> "*And at the hearing of the contest it was proven, and conceded without dispute*, that plaintiff had established a residence upon the land in controversy, had made improvements thereon" * * * "that, instead of abandoning the land, plaintiff was residing on, reclaiming, cultivating, and improving it when he was served with the notice of contest." (Italics supplied.)

No court may substitute its findings of fact for the findings of fact of the said department when made by the latter in an authorized proceeding with respect to a matter within its jurisdiction, unless in the collateral attack on the said de-

partment's findings it is shown (and it was not shown here) that those findings were the fruits of fraud or imposition practiced upon that department, or were badges of dishonor or corruption in said department. We have already quoted herein the findings of the land department in the contest proceeding and referred to the pages of the record where they may be found. Therefore this court will not fail to perceive that they are the opposite of the statements set out in the above quotation from 249 Fed. 562.

Maintaining our probe for allegations deemed important in 249 Fed. 562, we encounter, at pages 568 and 569 of the report, these statements which are *contradicted by the Record* insofar as material, to wit:

> * * * "the defendant *abandoned* this claim of a preference right to enter the land, *substituted* a lieu land selection, and obtained his patent upon that claim." * * * "he *suddenly abandoned* his entry and claim of a preferential right, and presented to the land department a scrip selection for the land." (Italics supplied.)

At page 55 of the Record it is shown that the defendant did not *abandon* his preference right, but did exercise it; that he did not *substitute* anything for such right; that he did nothing *suddenly;* that he exercised his preference right of entry by filing a homestead application on May 18, 1910; that such application was suspended pending a hearing involving an official survey; that on June 1, 1912, the application was allowed and an entry made thereunder; that plaintiff contested such entry unsuccessfully during a period of approximately three years from the date of filing of application therefor; that on March 6, 1914, nearly two years

after the making of such entry, the entry was voluntarily relinquished simultaneously with the filing of papers in an appropriation of the same land under assignable soldiers' and sailors' homestead entry rights. *While the homestead entry was relinquished, the land was not abandoned, but continued uninterrupted in the same possession.* (R. 55. See also R. 59 to 64 for decision of the General Land Office sustaining the appropriation under such assignable rights).

The only other statement in 249 Fed. 562, which is suggestive of or resembles a finding as to a matter of fact is the following observation at page 570 of the report anent the protest by plaintiff against defendant's appropriation of the land under the said assignable homestead rights, to wit:

> "He did not have a hearing upon his protest, although it was before the department for consideration."

But the record shows that he did have a hearing, an exhaustive, and painstaking hearing, which resulted in a six-page decision of the General Land Office in which the full history of this notable case in the land department is set out. (R., 59 to 64.)

Two very important and illuminating facts were overlooked in the *second* District Court decision as well as in the *second* Court of Appeals decision. It is nowhere noticed in either of those decisions that the relinquishhment which the appellant in this Court filed on March 6, 1914, simultaneously with the filing of the said assignable homestead rights, was *induced by a decision of the land department which is set out in the General Land Office decision of Decem-*

ber 23, 1914, on the appellee's protest against those assignable rights. (R., 59 to 64, at 60 and 61.) Nor did it attract the notice of the appellate court that the plaintiff in the District Court, at all times after May 18, 1910, rested all his pretensions and claims in the land department upon nothing else than an application by him *for second homestead entry* which was denied (R., 71, 72 and 53). *Such application for second entry was an admission by him, if that was necessary for any purpose, that his original entry had been cancelled and had gone out of existence in accordance with due process. Never did he seek to reinstate the original entry.*

WHEREIN THE DECISIONS BELOW EVINCE LACK OF NOTICE BY THE COURTS BELOW OF VITAL FACTS PERTINENT TO THE SO-CALLED LIEU LAND OR SCRIP SELECTION.

Edwards' homestead entry was canceled on Bodkin's contest on April 19, 1910 (R. 45, 56 and 49). This cancellation was the result of four concurring judgments, the first by the Register and Receiver, on December 31, 1908 (R. 37 to 39), the second by the General Land Office, on June 25, 1909 (R. 39 to 41, where the year is erroneously printed 1919), the third by the Secretary of the Interior on January 6, 1910 (R. 42, 43), and the fourth by the Secretary of the Interior, on April 19, 1910, in action on a motion for rehearing (R. 43, wherent denial of the motion is noted).

May 18, 1910, Bodkin filed application for homestead entry in exercise of his accrued and vested preference right (R. 55). This application was suspended be-

cause of an official inquiry as to a government survey. (R. 55). May 22, 1912, such suspension was revoked (R. 55). (*June 1, 1912, entry under Bodkin's application was allowed.* (R. 55.)

Edwards also, on May 18, 1910, filed an application to make homestead entry, *doing so as an applicant for the benefits of the second homestead entry legislation. He thereby, and necessarily, acknowledged the cancellation of his first entry, which had been successfully contested by Bodkin.* This Edwards application for second entry was successively rejected by the Register and Receiver, the General Land Office and the Secretary of the Interior, because of Bodkin's application in exercise of his preference right. (See Edwards v. Bodkin, 42 L. D., 172, for the Secretary's decision.) At pages 71 and 72 of the Record is printed the decision of the Secretary of the Interior of August 21, 1913, denying a motion for rehearing which Edwards filed in an attempt to have his second entry application sustained.

Now is presented this illuminating fact, viz., after failing to have this application for second entry sustained, Edwards, on *September 11, 1913*, filed an application to contest the entry which was allowed to Bodkin on June 1, 1912. Such application to contest was rejected by the Register and Receiver, by the General Land Office, and by the Secretary of the Interior, the latter's decision being rendered March 30, 1914. (See the General Land Office decision set out at pages 50 to 52 of the Record for the facts in that proceeding.)

More light is shed on this *cause celebre* in the Land Department from the fact that after thus twice harrassing Bodkin by meritless proceedings against him in the said department, Edwards fell back on the *al-*

leged final proof he submitted under the entry by him which was cancelled on Bodkin's contest. On *September 3, 1914,* Edwards moved for acceptance of such *alleged* proof. (R. 49 and 50.) Rejection of such proof followed as a matter of course. (See the decision of the General Land Office of March 30, 1915, and of the Secretary of the Interior of April 6, 1915, at pages 50 to 52 and at pages 53 to 54 of the Record, respectively.)

After Bodkin relinquished his homestead entry on March 6, 1914, without abandoning possession of the land, but, on the contrary, maintaining his right to possession thereof under a location of soldiers' and sailors' rights of additional homestead entry which he located on the land simultaneously with the filing of the relinquishment of his homestead entry, Edwards, several months thereafter and subsequent to his separating himself from the land, renewed proceedings against Bodkin in the Land Department, for stated reasons set out and deemed meritless in the detailed review of the case which appears in the decision of the General Land Office at pages 59 to 64 of Record. See also the General Land Office decision at pages 50 to 52 of the Record.

No court below seems to have considered it worth while to find and state what controlled Bodkin in relinquishing his entry. His unmarried daughter, Florence Bodkin, died after becoming entitled to and making application for a homestead entry in her own right. (R. 60.) Upon her death the right under her claim passed to her father and mother. But her father was then a homestead entryman himself. The situation thus presented was the subject of the decision in Wells v. Bodkin (42 L. D., 340). Because of the law

as expounded in that decision, Bodkin relinquished his own homestead entry, under which he had complied with the law for approximately two years, in order to qualify himself to enjoy the right inherited from his daughter. (See pages 60 and 61 of the Record for the right of election Bodkin had to retain his own entry, or reliquish same and enter the land applied for by his deceased daughter.) At the time he relinquished, Edwards, who had not been adjudged entitled to a second homestead entry and who then had no claim to the land in the Patrick H. Bodkin entry which was countenanced by law, was not in possession of the land covered by the Patrick H. Bodkin entry and could not have been in possession thereof lawfully. *Yet the courts below, overlooking all these facts, render decisions carrying the implication that Bodkin was a speculator in the public lands and had despoiled Edwards by and through an unconscionable use of so-called lieu land scrip.*

COUNSEL'S OATH OF CONVICTION THAT THIS PETITION FOR REHEARING IS WHOLLY MERITORIOUS.

There is a duty of good citizenship that rests upon an attorney at law in this court to which reference should be made. His duty to the court is even of larger importance than his duty to his client, for the reason that in aiding this court in its study of the law in a case before it he is indirectly participating, at least believes he is, in the formulation of judicial views which will affect not only his client but the entire nation. An attorney who could be influenced only by vanity, pique, chagrin, or profit, or anything but his

conscience, to file a petition for rehearing here would be clearly unworthy the confidence of *any* court.

That this court may have a basis, other than our argument (which proceeds from one of little learning in the law and of no deserved prestige in this or any court), for regarding this petition as the work and act of one moved only by the worthiest motives, counsel has presumed to subjoin a rather unusual affidavit of merit which he hopes will receive the consideration of the court.

Respectfully submitted:

PATRICK H. LOUGHRAN,
Mills Bldg., Washington, D. C.,
Counsel for the Petitioner.

AFFIDAVIT OF MERIT.

District of Columbia, ss:

Patrick H. Loughran being first duly sworn deposes and says: That for the past fourteen years he has practiced exclusively in public land cases in the Land Department and in the courts; that before entering upon such practice he was employed as an examiner of such cases in the General Land Office; that he is counsel of record in this Court for the appellant in Bodkin vs. Edwards, No. 495; that he became counsel for said Bodkin when said cause was pending in the Court of Appeals on the second appeal thereto; that he briefed the case in said court on behalf of said Bodkin; that he drafted the assignment of errors on the appeal to this Court and otherwise advised in the perfecting of said appeal; that it was he who advised against the making of answer to the motion to dismiss or affirm in this Court; that it was he who prepared the foregoing petition for rehearing.

Further deposing the affiant says: That he knows that the "law of the case" doctrine prevented the ex-

ercise of freedom of judgment on the materiality of facts by the District Court; that he knows the numerous rulings in the opinion of the Circuit Court of Appeals (249 Fed. 562) are repudiatory of statutory constructions, decisions and regulations of the Land Department that have prevailed for fifteen years; that he knows that the said Circuit Court of Appeals opinion has encouraged and induced litigation having for its objective the making of holders of titles under patents for public lands trustees of such titles for others.

Further deposing the affiant says: That with all the strength of his intellect and all the sincerity of his soul he commits himself unreservedly to the belief and conviction that the said opinion of the Court of Appeals is wholly and plainly erroneous in many respects important to promotion of the public interests; that with the very same sincerity and intensity of belief and conviction he says that the opinion of this Court of February 28, 1921, is seriously in error and that it should be, as he believes it will be, recalled, set aside and vacated after rehearing.

PATRICK H. LOUGHRAN,
Counsel for the Petitioner for rehearing.

Subscribed and sworn to before me this 25th day of March, 1921.

ADELAIDE SPRECKELMYER,
Notary Public.

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Land Department Refuses to Follow Rulings in Matters of Law Made by Federal Courts in Decisions which are Affirmed by the Supreme Court of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN,
Appellant and Petitioner,
v.
WILLIAM B. EDWARDS.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SECOND PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

An attorney hazards a rebuke or more serious disciplining by this court, only when he has grossly disserved his client here or has abused the privileges accorded under his admission to practice here. He does neither when he repeats an effort to serve well both this court and his client. Hence the filing of this *sec-*

ond petition for rehearing, without the slightest doubt that the attitude of this court toward counsel will be one of approbation rather than reprobation, after due consideration of its contents.

DESCRIPTION OF CASE.

Law or Fact?

No. 495 in this court is a case wherein Edwards, the appellee, filed below a complaint praying that Bodkin, the appellant, be decreed to be a trustee, for Edwards, of the legal title that passed to Bodkin under a patent which the United States issued to him for certain lands in Riverside County, California.

Do cases of this character ordinarily turn on questions of fact exclusively? Do they not almost invariably turn on questions of law exclusively? No. 495 PRESENTS QUESTIONS OF LAW WHICH HAVE NEVER BEFORE BEEN PRESENTED IN THE SUPREME COURT OF THE UNITED STATES.

As shown hereinafter, the *original* complaint was dismissed by the District Court, 241 Fed., 931, but was thereafter, and on appeal, sustained as a sufficient pleading by the Court of Appeals, *but sufficient only under the view taken by that Court of the meaning of an act of Congress which it said the land department had "mistaken" or "overlooked," for about fifteen years, and under its view that certain regulations of the Department of the Interior, which had obtained for fifteen years, plainly contravened the law, 249 Fed., 562.* After the case went back to the District Court, Edwards filed an *amended* bill.

The *amended* bill of complaint alleged that on July 17, 1902, the land in suit was included in a "second

form" withdrawal under the Reclamation Act, 32 Stat., 388, which withdrew it from entry, *except under the homestead laws* (Rec., 3); that thereafter, and on December 1, 1902, Edwards made a homestead entry of the land (Rec., 1); that subsequently (September 12, 1903), the withdrawal was changed from a "second form" to a "first form" withdrawal, the latter "form" being of "that class that precluded the further initiation of new rights of any kind or character" (Rec., 4); that by operation of law "all contest rights and privileges pertaining to the homestead law were cut off" by such "first form" withdrawal (Rec., 4); that, nevertheless, the land department prescribed regulations, in 1905, allowing contests to be initiated against entries of lands in "first form" withdrawals (Rec., 6); that Bodkin (on January 30, 1908) was permitted to file a contest against Edwards' entry upon the charge "that plaintiff (Edwards) had never established a residence, or made any improvements, and that he had abandoned the land for more than six months" (Rec., 5); that the contest affidavit of Bodkin was not executed by him on personal knowledge of the truth of its charges, but upon information and belief (Rec., 5); that the contest had abated by force of certain other regulations of the land department, which were promulgated in 1909 (Rec., 5); that on the evidence adduced in the contest proceeding, the land department (on April 19, 1910) cancelled Edwards' entry (Rec., 5 and 6); that the first form withdrawal was terminated and the land was restored to settlement and entry on April 18, 1910, and May 18, 1910, respectively, and that on the first stated date Edwards was in occupancy of the land and claiming it as a homestead settler (Rec., 6); that thereafter, and des-

spite an attempt by Edwards to make a homestead entry of the land, the Department of the Interior permitted a homestead entry thereof by Bodkin upon the ground that he had acquired a preference right of entry because of his successful contest against Edwards' homestead entry (Rec., 6); that thereafter the land department rejected an application by Edwards to contest Bodkin's homestead entry (Rec., 8); that Bodkin afterwards relinquished his homestead entry and appropriated the land under "scrip applications," and that a protest by Edwards against such applications was destroyed by some "incumbent of the land office" (Rec., 9); that patents issued to Bodkin under the "scrip" application in disregard of the rights of Edwards.

The *amended* complaint alleged that all the judgments and acts of the land department officials and of other officers of the government adverse to Edwards' claim to the land in suit were due to Bodkin's "friendly relations with certain land department officials" (Rec., 5); to a desire by the land department officials "to make good the assurances given to defendant (Bodkin) and in aid of his speculative program" (Rec., 5), to "field agents of the department" • • • "making wrong reports concerning plaintiff" (Rec., 5), to "private and confidential letters" from Bodkin and his attorneys "to the individual examiners in charge of the cases" (Rec., 9), to "bias and prejudice culminating in a conspiracy" (Rec., 10), to the alleged fact that the land department "was so seized with its own animosity, and so burdened with the animosity of others as to be incapable of rendering a just judgment" (Rec., 10), to "ignoring and mistaking the law and proceeding through a partisan bias and prejudice" (Rec., 2),

to intimidation of a State Court by a United States Attorney (Rec., 7), and to the alleged fact that "the Assistant Attorney General from Washington, D. C.," used "manufactured evidence" against Edwards (Rec., 8).

AT NO PLACE IN THE *AMENDED* COMPLAINT WAS IT EXPRESSLY OR OTHERWISE ALLEGED THAT THE LAND DEPARTMENT'S FINDINGS OF FACT IN PROCEEDINGS HAD BEFORE IT WERE WITHOUT ANY EVIDENCE, OR SUBSTANTIAL EVIDENCE, TO SUPPORT THEM.

In closing the amended complaint, Edwards summarized and fittingly described his case in these words:

> *"Plaintiff alleges that if these MISTAKES OF LAW and this bias and prejudice here shown, and the voluntary and involuntary fraud to which plaintiff has been subjected, had not been the CONTROLLING FACTORS IN THE CASE, patent would have issued to plaintiff, and not to defendant"* (Rec. 10). (Italics supplied.)

The answer to the *amended* complaint was a painstakingly prepared pleading, extending from page 11 to page 29 of the record, that cast upon Edwards the burden of proof of every one of his serious charges of malfeasance and misfeasance on the part of officers of the United States Government, and required of him due proof that corruption or bias and prejudice produced the findings of fact and rulings in law which the land department had made in its several decisions.

ONLY UPON THE THEORY THAT THE LAND DEPARTMENT WAS CORRUPT OR CRIMINALLY BIASED CAN THE CASE BE REGARDED AS ONE OF FACT AND NOT OF LAW. HAS THE SUPREME COURT OF THE UNITED STATES FOUND THAT THE SAID DEPARTMENT WAS CORRUPT OR BIASED?

Edwards was explicit in the statement of his case. He alleged that he had been wronged (1st) because the land department had made "mistakes of law," (2d) because there was "bias and prejudice" against him in the land department and in the Department of Justice, and (3d) owing to the "voluntary and involuntary fraud to which plaintiff has been subjected." *He asserted that the said mistakes, the said bias, and the said fraud were the "controlling factors in the case."*

WHAT WE SEEK TO DISCOVER BY THIS PETITION FOR RE-HEARING IS THE PARTICULAR ONE OF SUCH "CONTROLLING FACTORS" THAT CONTROLLED THE DECISION WHICH THE SUPREME COURT OF THE UNITED STATES RENDERED ON FEBRUARY 28, 1921. ITS SAID DECISION WAS THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT." WHAT WERE THOSE FACTS, AND WERE THEY FACTS IN PROOF ESTABLISHING BIAS OR FRAUD ON THE PART OF THE LAND DEPARTMENT? WE DO NOT KNOW, NOR CAN ANYONE KNOW FROM ANYTHING SET OUT IN THE SUPREME COURT'S SAID DECISION OF FEBRUARY 28, 1921, THE PRECISE FACTS WHICH THAT COURT HAD IN MIND. ALL THE LIGHT THAT

SAID DECISION AFFORDS AS TO WHAT CONTROLLED THE CONCLUSION OF THE SUPREME COURT IS CONTAINED IN THE OBSERVATION THEREIN "THAT IN THE PROCEEDINGS BEFORE THE LAND DEPARTMENT MATTERS PRESENTED BY EDWARDS WHICH SHOULD HAVE BEEN CONSIDERED WERE NOT CONSIDERED." WHAT WERE THOSE MATTERS, AND WERE THEY MATTERS OF LAW OR MATTERS OF FACT?

None of the courts below found any fact which was adjudged to be proof of bias in the land department or of fraud in that department operating upon Edwards. It is so plain as to be obtrusively evident, that the decisions below followed and applied the astonishing announcement of the Court of Appeals, 249 Fed., 562, that the land department had "mistaken" or "overlooked" a statute relating to the public domain, to the damage of Edwards, and that it had enforced against Edwards certain regulations that contravened the law.

If the *amended* complaint which was filed by Edwards is subjected to a closer scrutiny by the Supreme Court of the United States than has been given to it heretofore, it will become apparent to said court that Edwards did not allege that the land department had refused or failed to consider matters which he had presented to it and which it was the duty of said department to consider. *Further examination of that pleading will show only this, viz., allegations to the effect that the matters which Edwards did present to the land department were not considered by it with results to the liking of Edwards.*

If the record in No. 495 is more carefully examined

by the Supreme Court of the United States than it was examined heretofore, said court can not fail to discover therein the proof that all and everything Edwards alleged he had presented to the land department, was not only considered by said department, but was painstakingly and exhaustively considered by it. (R., 30 to 64; 71 to 73.)

If this case is again and more minutely inquired into by the Supreme Court of the United States it will be perceived by said court that Edwards did not allege that the land department had refused or failed to consider matters presented to it on his behalf, *but that what he alleged was that such matters as he had presented were considered by officers of said department who had been debauched, seduced and corrupted by Bodkin.*

If the Supreme Court of the United States will but again, and with more sedulousness, review the record in No. 495, it will not fail to apprehend that the man who did not hesitate to hurl the foulest of charges against many officers of the government, viz., that such officers ignored and disregarded the rights of one citizen in order to patent public lands of the United States to another, made not the slightest attempt to adduce any evidence in support of his accusations of criminal conduct in public office.

If the Supreme Court of the United States will but deliberate upon its decision of February 28, 1921, in the light of the pleadings and contents of the record, its understanding will insure appreciation by it of the justice of the observation that it is the only court which has delivered an utterance in No. 495 that ascribes to the land department something that is in line with Edwards' reckless and malicious allegations

that "friendly relations with certain land department officials," "confidential letters to the individual examiners in charge of the cases," etc., etc., produced the issue of a patent to Bodkin for public lands rightfully belonging to Edwards.

Unless the Supreme Court of the United States was of opinion that Edwards' charges of malfeasance in office by officers of the land department were supported by the evidence adduced, it is not possible for there to exist any rational theory to account for said court's announcement that "the case as presented here turns essentially on questions of fact" and that the case was decided below upon proof of refusal or neglect on the part of the land department to consider "matters presented by Edwards which should have been considered."

SUPREME COURT OF CALIFORNIA DECLARES CASE TO BE ONE WHICH WAS DETERMINED ON QUESTIONS OF LAW EXCLUSIVELY.

There is very respectable evidence that the Supreme Court of the United States misconceived the true character of a case before it when it referred to Bodkin vs. Edwards, No. 495, as a case that "turns essentially on questions of fact," in that the Supreme Court of the State of California, having before it the opinion of the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed., 562, and the opinion of the District Court, speaking through Judge Trippet, 267 Fed., 1004, said of those opinions of the Federal courts in Edwards v. Bodkin that "it was there held that the Commissioner of the General Land Office HAD MISTAKEN THE LAW in declaring that the settler (Edwards) had abandoned his homestead

claim." (McLaren vs. Fleischer, and Culpepper vs. Ocheltree, 185 Pac., 967 and 971, respectively, decided December 1, 1919.)

The foregoing observation by the Supreme Court of the State of California will be found at page 25 of the Record in McLaren vs. Ocheltree, No. 291 in the Supreme Court of the United States, a case that has come into said court upon a writ of certiorari, which was obtained upon the representation that when the State court absolutely refused to follow the rulings in matters of law of the Federal courts in Edwards vs. Bodkin, there arose a "direct conflict" of opinion *upon matters of law exclusively* which the Supreme Court of the United States should settle.

OPPOSING COUNSEL ALSO PERCEIVES AND UNDERSTANDS THAT THE CASE IS ONE OF LAW AND *NOT* ONE OF FACT.

Opposing counsel in No. 495 is the same opposing counsel in Nos. 291 and 292, the latter being cases which have come into the Supreme Court of the United States upon certiorari to the Supreme Court of the State of California, because in said two cases the said State court expressed views on matters of law "in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. Rep., 562, 568." (See the petition for certiorari in No. 291.)

Opposing counsel's brief in No. 291, copy of which was not served until April 16, 1921, contains the statement, at page 4 thereof, that in No. 291 "there is *necessarily* involved the question whether any valid contest can be initiated against any entry covering land included within such a withdrawal." (Italics supplied.)

In said brief, at said page thereof, appears the further statement:

> "The State courts have held in favor of such an authority in the Interior Department, but the Circuit Court of Appeals held directly to the contrary (Edwards v. Bodkin, 249 Fed., 562; 265 Fed., 621), *and the latter opinion has been affirmed by this Honorable Court in its decision rendered February 28, 1921, on a motion to dismiss or affirm (Bodkin v. Edwards, No. 495, October Term,* 1920)." Italics supplied.

FROM THE FOREGOING IT IS EVIDENT THAT OPPOSING COUNSEL AND OURSELVES ARE IN ENTIRE AGREEMENT AS TO ONE MATTER, AT LEAST, VIZ., THAT THE DECREE BELOW IN No. 495 WAS GRANTED SOLELY BECAUSE THE COURTS BELOW HAD HELD (1st) THAT CONTESTS AGAINST ENTRIES OF LANDS IN FIRST FORM RECLAMATION WITHDRAWALS WERE EXPRESSLY FORBIDDEN BY STATUTE, AND (2d) THAT ADMINISTRATIVE REGULATIONS THAT PERMITTED CONTESTS WERE INVALID.

Anyone who will read the matter at page 11 in opposing counsel's brief in No. 291 will cease to doubt the proposition that opposing counsel are of the opinion, an opinion shared by the bar and the public generally, that the Supreme Court of the United States, on February 28, 1921, *necessarily* approved, concurred in, sustained and gave plenary sanction to the ruling of the Court of Appeals, 249 Fed., 562, that the land department had "mistaken" or "overlooked" an act of Congress relating to the public domain, and had

done so for about fifteen years, and also, and for the same period, had enforced administrative regulations that contravened the law.

I.

District Judge Bledsoe in the District Court, sustained the motion to dismiss the *original* bill of complaint, 241 Fed., 931.

II.

The Court of Appeals, speaking through Circuit Judge Morrow, after saying that the land department had "mistaken" or "overlooked" a public land statute and that certain regulations of the said department were invalid, reversed Judge Bledsoe and directed that the order of dismissal be vacated, with leave to plaintiff to amend, if so advised, 249 Fed., 562.

III.

On and after the filing of the colorable amended complaint (District Judge Trippet remarking that there was no amendment that altered any material averment of the original bill, 267 Fed., 1004) defendant, *then realizing* (1st) *that Circuit Judge Morrow's rulings theretofore,* 249 Fed., 562, *in matters of law precluded the possibility of a denial of the prayers of the complaint in either the District Court or the Circuit Court of Appeals, and,* (2nd) *that therefore he was, necessarily, on the first leg of a journey to the Supreme Court of the United States on questions of law, filed an answer that imposed upon plaintiff the burden of proof of every allegation of the complaint that the Court of Appeals had theretofore adjudged was material.* THE

CASE WAS THEN SUBMITTED FOR DECISION BY THE DISTRICT COURT UPON AN AGREED STATEMENT OF FACTS AND SOME TESTIMONY FROM THE WITNESS CHAIR BY PLAINTIFF AND ANOTHER WHO TESTIFIED FOR HIM, WHICH TESTIMONY WAS PERMITTED TO GO IN OVER OBJECTION BY COUNSEL FOR BODKIN, WHO SAVED AN EXCEPTION. THEREAFTER SUCH TESTIMONY WAS ALLOWED TO STAND WITHOUT ANY ATTEMPT WHATSOEVER BY PLAINTIFF TO CONTROVERT OR REBUT IT (R., 65 to 70).

IV.

Judge Trippet found that those allegations of the bill, which had already been adjudged material by the Court of Appeals, excepting those allegations that charged government officers with bias, prejudice, fraud, etc., *were duly proved by the admitted facts and by the said unrebutted, and uncontroverted testimony, and, therefore, but necessarily following "the law of the case" as settled in the said prior Court of Appeals decision, signed a decree for the defendant.* 267 Fed., 1004.

It is vital that it be noted that Judge Trippett observed that "the plaintiff offered no proof regarding the misconduct of any of the officers in the land office."

That District Judge Trippet did not, *as the Supreme Court of the United States did,* rest a decision upon the wholly groundless statement that the evidence showed that the land department had failed to consider matters presented to it by Edwards, which it should have considered, is strikingly evident from the most conspicuous of all the real facts in the case, to

wit, that Judge Trippet, after finding, *on the admitted facts,* that Bodkin's affidavit of contest was executed on information and belief, and after stating *what the pleadings made one of the conceded facts,* viz., that Edwards remained upon the land from a date after initiation of Bodkin's contest until removed therefrom through legal processes invoked by Bodkin, expressly and unequivocally announced "We will, therefore, proceed to consider the case without regard to the rights of Bodkin, *for under the decision of the Court of Appeals, he had no rights to be considered.*" (Italics supplied.)

To impute to Judge Trippet's decision, *as the basis therefor,* a finding which he never made, viz., that the land department failed to consider matters presented to it by Edwards, which it should have considered, would be to misrepresent both that Judge and his decision.

V.

It was believed that to enter the Supreme Court of the United States thereafter, it was unavoidable that plaintiff should pass through the Court of Appeals. Accordingly he appealed to the latter Court, of course upon the record that had been made before Judge Trippet. Obviously, however, plaintiff could obtain no relief before the Court of Appeals, for the proof in the record was proof of such allegations in the bill of complaint, *excepting the allegations impeaching the integrity of government officers,* as the Court of Appeals had theretofore adjudged material and sufficient in law to entitle plaintiff to a decree. Inevitably, the Court of Appeals, speaking through District Judge Wolverton (265 Fed., 621), affirmed the decree which had been granted by District Judge Trippet.

Judge Wolverton exercised pains to make it unmistakably clear that his court's affirmance was, necessarily and unavoidably, an application to the case of the views of the Court of Appeals in matters of law which had been expressed theretofore by said court in 249 Fed., 562.

But Judge Wolverton did not dissent from Judge Trippet's finding that "the plaintiff offered no proof regarding the misconduct of any of the officers in the land office."

VI.

An appeal was duly taken to the Supreme Court of the United States. In the preparation of the record on such appeal, and only to save unnecessary expense to the appellant, who had been sued by appellee in *forma pauperis*, a considerable mass of patently irrelevant matter, which had not even been mentioned in any of the decisions theretofore rendered, and which, in the main, had gone into the record on the initiative of the alleged pauper, was very properly omitted. Some of such omitted matter was *all the evidence* adduced in the contest proceeding between Bodkin, contestant, and Edwards, contestee, in the land department, same having been the evidence which was the basis of that department's findings of fact in support of its action in cancelling Edwards' homestead entry. Neither the District Court, nor the Court of Appeals, had revised, modified or changed those findings of fact. *ON THE CONTRARY, THEY ACCEPTED THEM AS THEY WERE SET OUT IN THE COPIES OF THE SAID* DEPARTMENT'S DECISIONS AS PRINTED IN THE RECORD IN THE SUPREME COURT OF THE UNITED STATES. The other matter omitted was (1st), the copies of the three patents the land de-

partment had issued to Bodkin, the existence of which was alleged in the complaint and admitted in the answer, and (2nd), copies of the pleadings and of notes of proceedings in certain possessory actions between Bodkin and Edwards in the State Courts, which actions were brought after Bodkin had made a homestead entry of the land in suit, and in order to protect his possession against trespass by Edwards, which copies, of course, could not have been evidence, and were not deemed by either of the Courts below as evidence, of any fact of which the judiciary could take notice in determining whether in issuing patents to Bodkin, the land department had "mistaken" or "overlooked" the law, prejudicially to Edwards.

VII.

The entire evidence of every fact which either Court below had held was *proved*, THE WHOLE EVIDENCE OF ALL THE FACTS WHICH THE COURTS BELOW ADJUDGED WERE SUFFICIENT IN LAW TO REQUIRE A DECREE FOR EDWARDS, was carried into the record on which the case went to the Supreme Court of the United States.

Nothing more than that was required of Bodkin, the appellant, with respect to the record. His counsel had concluded that section 1 of rule 8 of practice in the Supreme Court of the United States required of him the elimination of all papers not necessary to the consideration of the questions to be reviewed.

Unless Arthurs *et al.* vs. Hart, 17 How., 5, 11, 12 and 15 is an unreliable guide in the preparation of a record in an *equity* case, Bodkin's counsel had not blundered. From the opinion in that case we quote the following:

"Two preliminary objections have been taken by the counsel for the defendant in error: 1. That, inasmuch as other evidence was given on the trial in the court below than that which has been brought on the record, or is found in the bill of exceptions, for aught that appears, the judgment may have been founded upon that evidence:

* * * * * * * * * *

"Evidence bearing exclusively upon questions of fact involved in the case, only incumber the record and embarrass the hearing in this court, as these questions are not the subject of review on error. *The mere fact, therefore, that other evidence was given on the trial besides that which is found in the bill of exceptions, furnishes no objection to an examination of the questions of law presented by it.*

"If that evidence bore upon these questions, and might influence our decision upon them, *the defendant in error should have brought it upon the record, or incorporated it in the bill of exceptions. His neglect to do so implies that it could properly have no such effect, if returned.*

* * * * * * * * * *

"And, in the return to the writ of error, so much of the evidence, *and no more, should be incorporated in the bill of exceptions, as was deemed necessary to present the points of law determined against the party bringing the writ.*" (Italics supplied.)

VIII.

The assignment of errors on the appeal to the Supreme of the United States, contained absolutely nothing which was even suggestive of a purpose to have that Court review rulings on the admissibility of evidence to prove a fact, in a case involving a Federal question. *Yet the Supreme Court's decision of February 28, 1921, contains the statement that "the case as presented here turns essentially on questions of fact."*

IX.

Such assignment of errors presented, exclusively, allegations that the Courts below had erred in their construction of acts of Congress and in their imputation of invalidity to certain Interior Department regulations.

X.

A motion to dismiss or affirm was filed in the Supreme Court of the United States. It was based upon two alleged grounds, each of which, accordingly as one appraises the legal attainments of the counsel that formulated it, was merely frivolity in said Court or a display of a lack of understanding of the law and of said Court's decisions. Because said motion was palpably lacking in merit, counsel for appellant in said Court ignored it, out of a desire to save his client further expense in his litigation with the alleged pauper.

This Court can not fairly hold counsel for Bodkin responsible for its misconception as to the character of the case. When any Court, after realizing that a motion to dismiss or affirm is without the remotest reference therein to a valid reason for sustaining it, prosecutes a search of the record for a ground upon which it can sustain such a motion, it takes upon itself the entire responsibility for any mistake it makes for granting the motion for a stated reason that has no basis in the actualities of things.

IT WOULD BE TREMENDOUS VIOLENCE TO JUSTICE FOR ANY COURT TO REFUSE TO CORRECT ONE OF ITS OWN ERRORS, COMMITTED WITHOUT CONTRIBUTION TO ITS COMMISSION FROM COUNSEL FOR THE PARTY WHO IS AF-

FECTED THEREBY, MERELY BECAUSE SUCH COUNSEL FAILED TO ANSWER A MOTION WHICH THE COURT, ITSELF, APPARENTLY ON FIRST READING, FULLY REALIZED WAS UTTERLY MERITLESS. OF COURSE THE SUPREME COURT OF THE UNITED STATES IS INCAPABLE OF WILLINGNESS TO INFLICT INJUSTICE.

XI.

Neither at the time of the filing of said motion, nor at any time thereafter, was any brief on the merits filed in the Supreme Court of the United States by either party to the cause.

The "settled rule" to which the Supreme Court of the United States refers in its decision of February 28, 1921, to wit, that concurring decisions below as to the facts will not be reviewed on the facts, unless clear error is shown, has come to have virtually the effect of statutory law. THEREFORE, IT IS RESPECTFULLY INSISTED THAT IT WOULD UNDOUBTEDLY BE BETTER CALCULATED TO INSURE AGAINST MISCONCEPTION AND ERROR IN SUCH A CASE AS SAID COURT DECIDED ON SAID DATE IF IT WERE THE PRACTICE TO POSTPONE CONSIDERATION OF THE ADVISABILITY OF APPLYING THAT "SETTLED RULE" UNDER A MOTION TO DISMISS OR AFFIRM WHICH WAS FRIVOLOUS IN ONE RESPECT AND DEVOID OF MERIT ALTOGETHER, UNTIL A BRIEF FROM ONE SIDE OR THE OTHER HAD BEEN FILED. IT SAVORS OF A SUMMARY JUDGMENT, OF A TRIAL WITHOUT A HEARING, FOR THIS COURT, AFTER AN APPELLANT HAS PAID A CONSIDERABLE SUM TO

PRINT HIS RECORD IN THIS COURT, TO AFFIRM DECISIONS BELOW IN THE CIRCUMSTANCES IN WHICH THIS COURT RENDERED AN AFFIRMANCE IN NO. 495 ON FEBRUARY 28, 1921.

XII.

FOR A STATED REASON WHICH WAS NOT EVEN REMOTELY HINTED AT IN SAID MOTION TO DISMISS OR AFFIRM, BEFORE THE APPELLANT HAD WRITTEN OR UTTERED A WORD IN DEFENSE OF HIS APPEAL, AND PROCEEDING UPON AN OBVIOUS MISCONCEPTION AS TO THE CHARACTER OF THE CASE, the Supreme Court of the United States, on February 28, 1921, overruled the motion to dismiss but sustained the motion to affirm, *rendering an unanimous opinion in support of its action*, which opinion is printed here in its entirety, to wit:

"SUPREME COURT OF THE UNITED STATES.

No. 495.—October Term, 1920.

Patrick H. Bodkin, *Appellant*,
vs.
William B. Edwards.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

(February 28, 1921.)

Mr. Justice Van Devanter delivered the opinion of the Court.

"This is a suit by Edwards to have Bodkin declared a trustee for him of the title to a quarter section of land in California. While the land was public and subject to entry under the homestead law, Edwards, a qualified applicant, made a homestead entry of it and afterwards submitted final proofs in due course. Bodkin instituted a contest against the entry and obtained its cancellation by the land department. The land officers then permitted Bodkin to make a homestead entry of the tract, afterwards allowed him to relinquish that entry and make others of the same tract under soldiers' additional rights of which he was the assignee, and finally patented the tract to him. During all these proceedings Edwards actively asserted the validity of his claim and sought to interpose it as an obstacle to passing the title to Bodkin. This suit was brought shortly after the patents issued. Apparently Edwards himself drafted the bill. The

District Court dismissed it without leave to amend and he appealed. The Circuit Court of Appeals, while recognizing that the bill was somewhat inartificial, held that it contained allegations which, if true, disclosed a right to the relief sought. The decree of dismissal was accordingly reversed. 249 Fed., 562. When the case got back to the District Court the form of the bill was helped by amendments, but the substance remained substantially as before. Bodkin answered and the issues were tried. The court found that the material allegations of the bill were true; that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards. A decree for the latter followed and Bodkin appealed. The Circuit Court of Appeals affirmed this decree, and in the course of its opinion said: 'A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated.' 265 Fed., 621. Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under Sec. 128 of the Judicial Code.

"The appellee, Edwards, now moves that the appeal be dismissed, or in the alternative that the decree be affirmed, under Rule 6, 222 U. S., Appendix, p. 10. The appellant, Bodkin, although served with the motion and supporting brief, has not presented any brief in opposition.

"The motion to dismiss must be denied and the one to affirm sustained. The case as presented here turns essentially on questions of fact. Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. Page v. Rogers, 211 U. S., 575, 577; Washington Securities Co. v. United States, 234 U. S., 76, 78; Wright-Blodgett

Co. v. United States, 236 U. S., 397, 402; National Bank of Athens v. Shackelford, 239 U. S., 81. No such error is shown by the record before us. Besides, it does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose.

Decree affirmed.

A true copy.
Test: *Clerk Supreme Court, U. S.*"

SUPREME COURT MISCONCEIVES CASE TO BE ONE TURNING ON QUESTIONS OF FACT EXCLUSIVELY.

The decisive observation in the foregoing opinion is the single one that the two courts below found "that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards."

There is not a syllable in Judge Trippet's decision, 267 Fed., 1004, that even tends to support the foregoing observation. That Judge rested his decision upon the effect in law, as the law had been expounded theretofore in 249 Fed., 562, of the admitted facts, the facts as stipulated by counsel (R., 30 to 65; 71 to 73). The admitted facts do not carry any matter that warrants said observation by the Supreme Court of the United States. Judge Trippet said that under the admitted facts he was required to hold, by reason of "the law of the case" doctrine, that, in contemplation of

law, there had been no contest by Bodkin against Edwards' entry.

There is in the Court of Appeals opinion, 265 Fed., 621, this statement, viz.:

> "A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated, including the supposition of this court relative to use made of the soldiers' additional homestead scrip by Bodkin in securing his entry of the land in the land department."

Neither that statement, nor any other statement in said Court of Appeals decision, delivered by District Judge Wolverton, carries the implication that said Judge found that the land department had not considered matters which it should have considered. No one possesses such powers of divination as to know what Judge Wolverton really meant by his reference to "the supposition of this Court." He vouchsafed no clue whatever to the truly cryptic meaning of the reference.

Both Judge Trippet and Judge Wolverton had before them the precise matters of fact in proof which are set out in the record of the case in the Supreme Court of the United States. For anyone to say that Judge Wolverton had found that the land department had not considered matters it should have considered, would be to impute to Judge Wolverton a lack of knowledge of the contents of the record in the case he had decided. *In the record in his court, as in the record in the Supreme Court of the United States, it was shown by irrefragable proof, which even the redoubtable and maligning Edwards made no attempt to question, that the land department did consider, re-*

consider, review, re-review, hear and re-hear everything ever presented to it by Edwards, and everything which he alleged in his complaint he had presented to it. (Rec., 38 to 43; 50 to 54; 57 to 64; 71, 73.)

Exceedingly unfortunate and occasioning much bewilderment is the fact that in the Supreme Court decision of February 28, 1921, there is not the slightest attempt at specification or particularity as to the matters of fact or law the land department did not consider. FROM WHICH IT FOLLOWS THAT, UP TO THIS TIME, NEITHER BODKIN, NOR HIS COUNSEL, NOR ANYONE ELSE, KNOWS THE PRECISE DEFAULT IN A MATTER OF DUTY ON THE PART OF THE LAND DEPARTMENT WHICH THE HIGHEST TRIBUNAL IN THE JUDICIAL SYSTEM OF THE UNITED STATES HAS MADE THE BASIS FOR AN OPINION THAT EVENTUATES IN DECREEING OUT OF BODKIN AND INTO EDWARDS THE LEGAL TITLE TO A TRACT OF LAND WHICH THE UNITED STATES PATENTED TO THE FORMER.

Certainly the Supreme Court of the United States did not actually intend by its decision of February 28, 1921, to do what each of the courts below declared there was no proof or evidence whatever for doing, to-wit, ACTUALLY CONVICT OFFICIALS IN THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT OF MALFEASANCE AND MISFEASANCE IN OFFICE. But what other inference is a possible inference from the Supreme Court's observation in its said decision of February 28, 1921, viz., that "in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title

was passed to Bodkin when it should have gone to Edwards"?

Is not the foregoing quotation from the Supreme Court's decision quite in line with the allegations in Edwards' complaint that land department officials, and officials of the Department of Justice, had been biased and prejudiced against him, had conspired against him and had used "manufactured" evidence against him? THOSE ALLEGATIONS BY EDWARDS OF ACTUAL WRONG-DOING BY SAID OFFICIALS WERE THE ONLY ISSUABLE ALLEGATIONS OF FACT SET OUT IN HIS COMPLAINT UNDER WHICH IT WAS POSSIBLE FOR THE JUDICIARY TO HAVE FOUND THAT THE LAND DEPARTMENT HAD NOT CONSIDERED MATTERS WHICH IT SHOULD HAVE CONSIDERED. Those allegations were certainly not admitted to be true under Bodkin's answer. Furthermore, we submit that it is quite impossible for anyone to discover in the language of any of the decisions below anything of a nature likely to advise anyone of the fact, if it be a fact, that any of the courts below had found that the land department had refused to give consideration to matters presented to it by Edwards on his behalf.

IT IS RESPECTFULLY SUBMITTED THAT IT IS NOT IN THE POWER OF EVEN THIS AUGUST TRIBUNAL TO RE-CREATE THE DECISIONS BELOW, TO MAKE THEM DECISIONS THAT REST UPON THE DETERMINATION OF QUESTIONS OF FACT EXCLUSIVELY WHEN, UNMISTAKABLY AND OBVIOUSLY, THEY REST UPON THE DETERMINATION OF QUESTIONS OF LAW EXCLUSIVELY. NOR CAN EVEN THE GREAT EFFECT UPON THE PSY-

CHOLOGY OF THE BENCH AND BAR OF THE NATION OF THE OPINIONS OF THIS, THE WORLD'S GREATEST COURT, CAUSE THE BENCH AND BAR TO SEE, READ AND UNDERSTAND THE DECISIONS BELOW OTHERWISE THAN AS DECISIONS THAT ADJUDICATED A CONTROVERSY BETWEEN CITIZENS IN ACCORDANCE WITH THE VIEWS OF THE COURTS BELOW ON THE EFFECT IN LAW OF ADMITTED FACTS.

THE AUTHOR OF THIS PETITION HAS SUFFICIENT REASON FOR STATING THAT THE DEPARTMENT OF THE INTERIOR WILL CONTINUE TO REFUSE, AS IT HAS REFUSED IN THE PAST, WELLS v. FISHER, 47 L. D., 288, TO FOLLOW THE RULINGS IN MATTERS OF LAW WHICH WERE MADE IN THE DECISIONS OF THE FEDERAL COURTS BELOW AND WHICH THE SUPREME COURT OF THE UNITED STATES AFFIRMED ON FEBRUARY 28, 1921.

PUBLIC INTEREST, AS WELL AS PRIVATE RIGHT, REQUIRE THAT THIS PETITION BE GRANTED.

Within thirty days from February 28, 1921, and before mandate went down, a petition for rehearing under the decision of that date was filed. Such petition was denied, but not denied in an order announced from the bench. The only notice given to counsel for Bodkin of the denial was contained in a letter to him from the office of the court's clerk.

The cause of justice must be served at any cost.

Therefore we offer no apology to anyone for disclosing here the fact that after rendition of the Supreme Court decision of February 28, 1921, the Department of the Interior, realizing, as everyone familiar with public land matters must realize, that said decision will foment and encourage grossly unjust litigation attacking the security of numerous titles under numerous patents issued by the United States, made representations to the Department of Justice concerning said decision, and submitted to the judgment of the latter Department the propriety of filing in the Supreme Court of the United States a motion for leave to file a petition for rehearing *amicus curiae*.

The Department of Justice, FOR NO OTHER APPARENT OR STATED REASON than that it deemed it improper to defend the decisions and regulations of the land department that had been uniformly followed and enforced for fourteen years in a case between citizens in the Supreme Court of the United States, indicated that it felt constrained to refrain from filing such a motion. Co-ordinate departments of this government should be co-operative in the sole business of government, to wit, insurance of justice under the law to the citizen, to one of the owners of the government. No wrong to Edwards is possible from an act of the Department of Justice which is calculated to accomplish nothing more than to apprize the Supreme Court of the United States that, acting under a misapprehension as to the character of No. 495, it has affirmed a decree which is without any basis whatsoever therefor, except an inferior Federal court's patently erroneous conclusion (a conclusion which the land department has refused and will continue to refuse to abide), viz., that an act of Congress which,

in its express terms, specifically and exclusively relates to desert land entries was intended by Congress to relate to homestead entries also, and its further questionable conclusion that certain administrative regulations of the land department are in contravention of law.

When the Supreme Court of the United States has actually wronged both itself and a citizen, it is the sacred duty of that citizen's counsel to that Court as well as to his client, to point out specifically and unerringly the cause of the inadverent injustice to court and client.

THE MOST SERIOUS THING THE SUPREME COURT OF THE UNITED STATES HAS DONE IN THIS CASE IS, THAT BY ITS DECISION OF FEBRUARY 28, 1921, IT HAS FURNISHED ITS CRITICS, IF IT HAS ANY, WITH PROOF THAT IT HAD ENTIRELY MISCONCEIVED THE TRUE CHARACTER OF A CASE WHICH WAS PRESENTED TO IT UPON A RECORD WHICH CAN NOT TRUTHFULLY BE SAID TO CONCEAL OR EVEN DIM ITS TRUE CHARACTER.

And we venture further out of a sincere desire to avert just criticism of the Supreme Court of the United States, as well as the possibility of ascription to it of indifference to a bona fide, intelligent and maturely considered petition for rehearing, to say that from said Court's denial of our first petition for rehearing it might be inferred, by the uninformed, that the Court seemed to prefer to disregard its obvious misconception as to the character of the case rather than to correct that error.

The foregoing statement, as we very respectfully submit, fully justifies this second petition for rehearing. But, of course, it is fitting that we add, that our

respect for the Supreme Court of the United States, our unfeigned, genuine and profound respect for and confidence in it, the best of the institutions established by the possibly Divinely inspired men who founded a government designed to protect and effectuate the rights of man, must not be measured by the inference as to our attitude toward it which some men of more proficiency than ourselves in the power, or the art, of indirect expression of the same ideas might draw from our manner of statement of the case we present in this second petition for rehearing.

While our respect for this tribunal is boundless, we are without respect for or fear of misconception or error, regardless of its source. It is impossible for Lincoln's immortal words concerning the theory and principle of the government of the United States to have a basis in fact, it is grotesque hypocrisy to assert that the real spirit of the people of America was expressed in the recent shibboleth of battle that the world must be made safe for democracy, if there is not in the manhood of American citizenship the courage to insist that the Supreme Court of the United States avert an injustice to a citizen that results from a decision by it which was rendered under misconception and misapprehension.

PROFFERED SUPPLEMENTAL RECORD SHOWS THAT RECORD AS HERETOFORE PRINTED IN SUPREME COURT WAS A SUFFICIENT RECORD.

It is beyond the possibility of successful questioning that we serve hereby the Supreme Court of the United States, primarily, our client, secondarily, and lastly,

ourselves, for it might be inferred from this Court's observation in its opinion of February 28, 1921, viz., that the record "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included," that through ignorance or futile design we had painstakingly sought to withhold from the Court's notice material matter hurtful to our client's case but helpful to the case of his adversary.

THAT THE SUPREME COURT OF THE UNITED STATES MAY BE ENABLED TO DETERMINE, (1st) WHETHER THERE EXISTS THE SLIGHTEST REASON FOR A SUPPOSITION THAT ANY MATTER OMITTED FROM THE RECORD IN No. 495 AS PRINTED IN THIS COURT WAS OMITTED THROUGH CULPABLE DESIGN ON THE PART OF COUNSEL FOR BODKIN, AND (2nd) WHETHER SUCH OMITTED MATTER POSSESSED MATERIALITY, WE HAVE, ON THE DATE OF THE FILING OF THIS SECOND PETITION FOR REHEARING, DELIVERED TO THE CLERK OF THE SAID COURT A "FULL TRUE AND CORRECT COPY," DULY CERTIFIED BY THE CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, OF EVERY WORD AND FIGURE IN THE RECORD OF BODKIN VS. EDWARDS, AS THAT RECORD WAS FILED AND PRINTED IN SAID COURT OF APPEALS, WHICH WAS OMITTED FROM THE TRANSCRIPT OF THE RECORD IN SAID CAUSE AS PRINTED IN THE SUPREME COURT OF THE UNITED STATES.

BODKIN AND HIS COUNSEL ARE READY

AND WILLING, ARE EAGERLY DESIROUS, TO HAVE PRINTED BY WAY OF A SUPPLEMENTAL RECORD, OR TO INCORPORATE INTO AN ENTIRELY NEW PRINTED RECORD IN THE SUPREME COURT OF THE UNITED STATES, THE ONE HUNDRED AND SIXTY-ONE (161) PAGES OF MATTER, THE MATTER OMITTED FROM THE PRINT OF THE RECORD IN THE SUPREME COURT OF THE UNITED STATES AND WHICH, CERTIFIED TO BY THE CLERK OF THE SAID COURT OF APPEALS, IS NOW IN THE CUSTODY OF THE CLERK OF SAID SUPREME COURT. IN OTHER WORDS, IF THE SUPREME COURT OF THE UNITED STATES WILL BUT EXERCISE ITS DISCRETION TO THE EXTENT OF RESTORING NO. 495 TO THE DOCKET FOR ARGUMENT, SUCH SUPPLEMENTAL RECORD, OR SUCH ENTIRELY NEW RECORD WILL BE PRINTED IN SAID COURT, ACCORDINGLY AS SAID COURT MAY DESIRE, NOTWITHSTANDING THE CONVICTION OF COUNSEL FOR BODKIN THAT THE OMITTED MATTER HAS EVER BEEN, ON ITS FACE, UTTERLY IMMATERIAL AND THEREFORE (ARTHURS, ET AL., V. HART, 17 HOWARD, 5, 11, 12, QUOTED FROM ELSEWHERE HEREIN), NEVER HAD A RIGHTFUL PLACE IN THE CASE OR IN ANY RECORD THEREOF.

WE NOW SUBMIT THAT WE HAVE DONE ALL AND EVERYTHING THAT HAS EVER BEEN WITHIN THE RANGE OF POSSIBILITY TO ENABLE THE SUPREME COURT OF THE UNITED STATES TO PERCEIVE THAT ITS DECISION OF FEBRUARY 28, 1921, PROCEEDED FROM A MISCONCEPTION OF THE CHARAC-

TER OF THE REAL AND ONLY ISSUES IN No. 495, AND THAT THERE NEVER EXISTED THE SLIGHTEST JUST CAUSE FOR THE IMPLIED CRITICISM OF COUNSEL FOR BODKIN (THAT HE SOUGHT TO KEEP MATERIAL MATTER OUT OF THE RECORD) WHICH IS CARRIED IN THE OBSERVATION OF SAID COURT THAT THE PRINTED RECORD IN SAID CAUSE "DOES NOT CONTAIN ALL THE EVIDENCE THAT WAS BEFORE THE COURTS BELOW, A PART HAVING BEEN OMITTED UNDER THE APPELLANT'S SPECIFICATION OF WHAT SHOULD BE INCLUDED."

CONCLUSION.

If the decision of the Supreme Court of the United States of February 28, 1921, in Bodkin v. Edwards, No. 495, October Term, 1920, is permitted to stand, despite the demonstration of its indefensible character which is made in this second petition for re-hearing, we shall be compelled to conclude that at least one of the unanimous opinions of that court did not mean what it implied, viz., that the intellect of every member of that tribunal had studied the record in the case and that the unanimous opinion therein faithfully reflected each intellect's conclusion thereon, for it is altogether impossible for us to believe that the majority of the minds of that bench would after thorough examination of the record in No. 495, entertain the belief that the courts below rested their decisions upon their concurrent findings "that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin

when it should have gone to Edwards," and that the record in No. 495, and the assignment of errors it carried justified the observation that "the case as presented here turns essentially on questions of fact."

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for Petitioner and Appellant.

DISTRICT OF COLUMBIA, *ss:*

Patrick H. Loughran being first duly sworn deposes and says that he is counsel of record for the appellant and petitioner in No. 495, October Term, 1920, Supreme Court of the United States; that he drafted and filed the first petition for rehearing in said cause as well as the foregoing second petition for rehearing therein; that in so doing he has, as he sincerely believes, sought to serve more this Court than his client; that he knows No. 495 was decided in both Courts below on questions of law exclusively and that it was presented in the Supreme Court of the United States on questions of law exclusively; that he knows the said first petition and the foregoing second petition, to be entirely meritorious and that this Court should restore said cause No. 495 to the docket for argument.

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for Petitioner and Appellant.

Subscribed and sworn to before me this 11th day of April, 1921.

[SEAL]

ADELAIDE SPRECKELMYER,
Notary Public.

COPY

No. 495.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1920.

Patrick H. Bodkin,
Appellant,
vs.
William B. Edwards,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE NINTH CIRCUIT.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

SAMUEL HERRICK,
Westory Building,
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HENRY M. WILLIS,
Citizens Bank Building,
Los Angeles, Calif.,
Attorneys for Appellee.

Parker & Stone Co., Law Printers, 215 New High St., Los Angeles.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 495.
October Term, 1920.

Patrick H. Bodkin,
Appellant,

vs.

William B. Edwards,
Appellee.

MOTION TO DISMISS OR AFFIRM.

In the matter of the appeal filed herein, the appellee moves that the same be dismissed because:

(1) The court has no jurisdiction, no federal question being involved in the right claimed by the appellant.

Or, if ground for jurisdiction appears, the appellee moves that the judgment and decree of the United States District Court, for the Southern District and Division of California,

as affirmed by the Circuit Court of Appeals for the Ninth Circuit, be affirmed because:

(1) No specific error assigned in the appeal raises any question necessary to its determination.

(2) The question attempted to be raised by the assignment of error is purely hypothetical, based upon the supposititious right appellant *might* claim under conditions other than that disclosed by the record.

(3) The decision of every question necessary to the determination of this appeal, or attempted to be raised by the assignment of errors, is absolutely foreclosed by the prior decisions of this court.

(4) It is manifest that the appeal is entirely without merit, and is taken only for delay.

Respectfully submitted,

SAMUEL HERRICK,

HENRY M. WILLIS,

Attorneys for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 495.
October Term, 1920.

Patrick H. Bodkin,
Appellant,

vs.

William B. Edwards,
Appellee.

Brief in Support of Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

This suit, filed by the appellee in the United States District Court for the Southern District and Division of California in September, 1916, sought to have the appellant, to whom a series of patents for a certain tract of land had been issued by the Land Department of the Government, declared a trustee holding the title to such land for the benefit of the appellee herein. The bill of complaint was first dismissed by the

District Court without leave to amend, and this judgment was reversed by the Circuit Court of Appeals for the Ninth Circuit in March, 1918 (249 Fed. 562). On trial by the District Court, pursuant to the mandate of the Court of Appeals, the court found all the material facts set forth in the bill of complaint were true, and entered its decree according to the prayer of the complaint, April 18, 1919. From this decree the appellant appealed in turn to the Court of Appeals, and that court, in the second appeal, having affirmed the decree of the District Court on the ground that no new question was raised in such appeal, the appellant brought the present appeal to this court.

The object of this motion is to prevent a denial of justice by the long delay which an absolutely meritless appeal would entail if its lack of merit should not be called to the attention of the court.

The only facts which need be stated for the purpose of this motion are: On December 1, 1902, the appellee made homestead entry of the land in controversy, and pursuant thereto established his residence on the land and began its improvement. September 12, 1903, the land entered was included within a complete withdrawal, and while subject to that withdrawal the Land Department, on the authority of a regulation made by it June 5, 1905, permitted the appellant

here to contest the entry of the appellee on the ground of abandonment. April 23rd, 1909, the appellee completed the requirements of the land laws under his entry, and made final proof thereof before the land office, which proof the Land Department, not disputing its sufficiency, at all times refused to consider, solely because of the contest appellant was permitted to initiate during the withdrawal as stated.

The withdrawal was vacated May 18, 1910, and on June 1st, 1912, the Land Department accepted a homestead entry of the appellant in recognition of his supposed preferred right, after canceling the entry of appellee regardless of his final proof made as aforesaid, three years before.

The appellee continued to assert his right under his entry and final proof of completed requirements, and resisted the claim of appellant under his allowed entry for several reasons, the only reason that need be mentioned here being that appellant was disqualified to claim this land as a homestead because he was at the same time claiming other land by homestead. On May 27, 1913, the Land Department admitted the correctness of this contention, but, still refusing to consider the completed claim of the appellee, canceled appellant's claim to the *other* land claimed as homestead. Thereafter the appellant, representing to the Land Depart-

ment that the other land claimed was his real homestead, induced the department, on March 9, 1914, to permit him to place his homestead claim on such other land instead, tendering with his relinquishment of entry to the land to which appellee had completed claim five years before, three soldier's additional scrip applications.

At the time appellant made the said relinquishment, in order to continue to claim the other land claimed by him as his real homestead, or while his new scrip applications were pending before the department, the appellee had also pending before the department: (1) an application to contest the entry relinquished; (2) a motion to reinstate appellee's former entry and consider his final proof; (3) a petition for the exercise of the supervisory authority of the secretary of the interior in regard to the entire matter; and (4) a protest against the acceptance of the scrip applications of appellant, all of which were refused consideration by the Land Department.

The errors assigned in this appeal are:

"1. The court erred in holding that the Land Department erred in matter of law in finding and deciding that the appellee had abandoned his homestead entry.

2. The court erred in holding that appellant had not acquired a preference right of entry under the act of May 14, 1880, by virtue of the

final judgment rendered by the Land Department in and on appellant's contest against appellee's homestead entry.

3. The court erred in holding that the regulations of the Department of the Interior of January 19, 1909 (37 Land Decisions 365) terminated any and all right appellant had acquired by and under his contest against appellee's homestead entry.

4. The court erred in holding that the appellee was entitled to his homestead entry and the lands covered thereby, for equitable reasons, despite and notwithstanding the contest initiated against said entry by the appellant and the findings of fact and conclusions of law set out in the decisions and judgments of the Land Department under such contest.

5. The court erred in assuming, contrary to the explicit showing the record before it presented, that appellant exercised the preference right of entry awarded to him through the decisions of the Land Department by locating assignable soldiers' additional homestead rights upon the lands involved in the litigation, the record showing that appellant exercised such preference right by making a homestead entry of the land on June 1, 1912.

6. The court erred in failing to perceive among the admitted facts in the litigation the fact that, in enjoyment of his preference right of entry, the appellant filed his homestead application May 18, 1910; that such application was finally accepted and entry thereunder allowed on June 1, 1912, and that it was not until March 6, 1914, that the appellant located the assignable soldiers' additional homestead rights on the land, doing so contemporaneously with the relinquishment of his homestead entry.

7. The court erred in affirming the decree of the court below granting the prayers of the appellee's bill.

8. The decree is contrary to law."

It is seen that, insofar as these assignments are specific and intelligible, they are based entirely on the assumption that the appellant acquired by his contest, notwithstanding the withdrawal, a preferred right to the land, and that this right in some way survived after use, and after relinquishment of the entry allowed in its recognition, and that it barred consideration of any right of the appellee. Both these assumptions are absolutely barred by the prior decisions of this court.

This court decided that:

> "Vested rights can not be acquired to land reserved from sale."
>
> Morton v. Nebraska, 21 Wall. 660;
>
> Smelting Co. v. Kemp, 104 U. S. 636;
>
> Campbell v. Wade, 132 U. S. 37.

And regarding a right under a new entry after a relinquishment (here referring to a *third* party) the court has decided:

> "If there had been no contest, and the land records are free from any other claim than that which is relinquished, the second entryman may perfect title. But if the records of the land office show that there had been a contest, and the successful contestant makes a relinquishment, a third

> party entering the land is charged with notice of the equitable rights of the unsuccessful contestant; and if, as a matter of law, those rights are entitled to protection, they can be enforced whenever the legal title has passed from the government."
>
> McClung v. Penny, 189 U. S. 143-147.

But in this case not only was appellant "charged with notice" of the equitable rights of the appellee when tendering the scrip applications, but by his assignments of error he bases his claim in this litigation entirely on the fact that *he* was the "successful contestant" of the record claims, for the consideration of which there were pending and urged before the department at the time appellant relinquished his allowed claim, several separate and appropriate proceedings for reinstatement and recognition.

However incomplete the claim of the appellee might have been at the time appellant claimed to initiate a right of entry, upon the relinquishment of that entry it was the duty of the Land Department to reconsider the formerly rejected claims of the appellee and reinstate his entry.

Sarah Renner, 2 L. D. 43;
Florey v. Moat, 4 L. D. 365;
Mills v. Burge, 4 L. D. 447;
Holmes v. Northern Pac. R. R. Co., 5 L. D. 333;
Conley v. Mills, 11 L. D. 251;
Osborne v. Knight, 22 L. D. 459;
Brooks v. McBride, 35 L. D. 442.

And this duty devolved whether the appellee himself moved for such action, or whether the secretary of the interior proceeded on his own motion.

Knight v. U. S. Land Assn., 22 L. D. 462, 142 U. S. 161.

But the claim of appellee was *not* incomplete at the time appellant relinquished his entry, and was in no way dependent upon such relinquishment to give it validity. The records of this case show that before the entry relinquished was allowed, before even the right to make it was, by vacation of the withdrawal, initiable, either under the law or the regulations here claimed to supersede the law, the claim of the appellee was completed and final proof made thereof, and it is one of the most firmly established principles of the land law as declared by this court, that the full equitable title passed to the appellee at that time, and that thereafter the Land Department, not disputing the sufficiency of such proof, was without authority to dispose of the land to another.

Lytle v. Arkansas, 9 Wall. 314;
Dermott v. Jones, 2 Wall. 1;
Stark v. Starrs, 6 Wall. 402;
Carroll v. Safford, 3 How. 441;
Lindsey v. Hawes, 2 Black. 554;
Hoofnagle v. Anderson, 7 Wheat. 212;

Witherspoon v. Duncan, 4 Wall. 210;
Shepley v. Cowan, 91 U. S. 330;
Barney v. Dolph, 97 U. S. 652;
United States v. Thompson, 98 U. S. 486;
Simmons v. Wagner, 101 U. S. 260;
Deffeback v. Hawke, 115 U. S. 302;
Van Brocklin v. Tennessee, 117 U. S. 151;
Cornelius v. Kessel, 128 U. S. 456;
Buxton v. Traver, 130 U. S. 232;
Redfield v. Fisher, 132 U. S. 239;
Hastings v. Whitney, 132 U. S. 362;
Harden v. Jordan, 140 U. S. 371;
Benson Min. Co. v. Alta Min. Co., 145 U. S. 432;
Dibble v. Bellingham Co., 163 U. S. 63;
Doran v. Kennedy, 237 U. S. 362.

From the foregoing it is seen that, before the right claimed for appellant could be considered, this most firmly established principle of this court would have to be ignored, and, conceding every error assigned to the Honorable Circuit Court of Appeals to be error, the only possible result of the adjudication would be to find that the right claimed for appellant was still invalid for one of the reasons set forth, if not for the other reasons which were specified and determined by the Court of Appeals, or, to

decide what hypothetical right appellant *might* now have, *if* he had *not* relinquished the entry erroneously allowed him to the land to which the appellee had completed claim, but had relinquished his claim to the other land, which he still claims, instead.

It is respectfully submitted that appellant should not be permitted to delay justice and occupy the attention of the court by asking it to deliberate upon so frivolous a question. It is also submitted that, as appellant has no claim of right that is based upon any law of the United States, the court should refuse to entertain jurisdiction, or, if jurisdiction is entertained, the judgment and decree of the lower courts should be affirmed on notice of the record facts herein set forth.

Respectfully submitted,

SAMUEL HERRICK,

HENRY M. WILLIS,

Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 495.—October Term, 1920.

Patrick H. Bodkin, Appellant,
vs.
William B. Edwards.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit by Edwards to have Bodkin declared a trustee for him of the title to a quarter section of land in California. While the land was public and subject to entry under the homestead law, Edwards, a qualified applicant, made a homestead entry of it and afterwards submitted final proofs in due course. Bodkin instituted a contest against the entry and obtained its cancellation by the land department. The land officers then permitted Bodkin to make a homestead entry of the tract, afterwards allowed him to relinquish that entry and make others of the same tract under soldiers' additional rights of which he was the assignee, and finally patented the tract to him. During all these proceedings Edwards actively asserted the validity of his claim and sought to interpose it as an obstacle to passing the title to Bodkin. This suit was brought shortly after the patents issued. Apparently Edwards himself drafted the bill. The District Court dismissed it without leave to amend and he appealed. The Circuit Court of Appeals, while recognizing that the bill was somewhat inartificial, held that it contained allegations which, if true, disclosed a right to the relief sought. The decree of dismissal was accordingly reversed. 249 Fed. 562. When the case got back to the District Court the form of the bill was helped by amendments, but the substance remained substantially as before. Bodkin answered and the issues were tried. The court found that the material allegations of the bill were true; that in the proceedings before the land department matters presented by Edwards which should have been considered

were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards. A decree for the latter followed and Bodkin appealed. The Circuit Court of Appeals affirmed this decree, and in the course of its opinion said: "A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated." 265 Fed. 621. Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under § 128 of the Judicial Code.

The appellee, Edwards, now moves that the appeal be dismissed, or in the alternative that the decree be affirmed, under Rule 6, 222 U. S., Appendix, p. 10. The appellant, Bodkin, although served with the motion and supporting brief, has not presented any brief in opposition.

The motion to dismiss must be denied and the one to affirm sustained. The case as presented here turns essentially on questions of fact. Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. *Page* v. *Rogers*, 211 U. S. 575, 577; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 402; *National Bank of Athens* v. *Shackelford*, 239 U. S. 81. No such error is shown by the record before us. Besides, it does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose.

Decree affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.